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IN THE

Supreme Court of the United States

October Term, 1984

THE STATE OF FLORIDA

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Third District Court of Appeal

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

FIRST ISSUE

WHETHER THE DECISION OF THE FLORIDA COURT, LIMITING THE AUTHORITY OF THE UNITED STATES CONGRESS, CONSTRUING THE UNITED STATES CONSTITUTION AND HOLDING THAT UNDER 19 U.S.C. §1581(a) UNITED STATES CUSTOMS OFFICERS MAY NOT BOARD A VESSEL IN CUSTOMS WATERS FOR A ROUTINE DOCUMENT EXAMINATION WITHOUT REASONABLE SUSPICION IF THE CUSTOMS OFFICERS ARE ALSO LOOKING FOR DRUGS, IS IN DIRECT CONFLICT WITH AND IS A PLAINLY ERRONEOUS CONSTRUCTION OF UNITED STATES V. VILLAMONTE-MARQUEZ, ___U.S.___, 103 S.Ct. 2573 (1983)?

SECOND ISSUE

WHEN CUSTOMS OFFICERS APPROACH TO INSPECT A VESSEL AND ITS CONTENTS UNDER UNITED STATES V. VILLAMONTE-MARQUEZ, AND 19 U.S.C. 1581(a) AND 21 U.S.C. §955 MAY THE DEFENDANT DEFEAT THE CUSTOMS OFFICER'S LAWFUL AUTHORITY BY QUICKLY REMOVING HIS BOAT FROM CUSTOMS WATERS AND PUTTING IT ON A LAND BASED TRAILER?

QUESTIONS PRESENTED
(continued)

THIRD ISSUE

WHETHER THE STATE COURT'S REJECTION OF THE CUSTOMS DRUG SMUGGLER PROFILE PRESENTATION AND REASONABLE SUSPICION ANALYSIS UNDER THE UNITED STATES CONSTITUTION IS IN DIRECT CONFLICT WITH FLORIDA V. ROYER, ___ U.S. ___, 103 S.Ct. 1319 (1983); UNITED STATES V. MENDENHALL, 446 U.S. 544 (1980) AND UNITED STATES V. CORTEZ, 449 U.S. 411 (1981)?

FOURTH ISSUE

WHETHER THE EXCLUSIONARY RULE SHOULD BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida; the Appellant in the District Court of Appeal of Florida, Third District and the prosecution in the Florida trial court. The Respondent, SILVIO P. ZAFRA, was the Respondent in the Supreme Court of Florida; the Appellee in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix attached hereto and consist of pages A1-A74.

I.

OPINIONS BELOW

The opinion of the District Court of Florida, Third District upon remand from this Court is reported at State v. Zafra, 444 So.2d 1064 (Fla. 3d DCA 1984). (A59-A63). The original opinion of the Florida District Court affirming the granting of the Defendant's Motion to Suppress is reported at State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982). The opinion of the Florida Supreme Court denying the State's Application for review, is contained in the Petitioner's Appendix at "A73" and will be reported by the West Publishing Company. The West Publishing Company citation is the official reporter for citation to these opinions.

II.

JURISDICTION

On October 18, 1984, the Supreme Court of Florida denied the State's timely application for review. A73. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3); Title 19, United States Code §1581(a); and Amedments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. See, Art. I, §12 Fla. Const.; see, also, Hetland v. State, 366 So.2d 831 (FLa. 2d DCA 1979) approved and adopted, Hetland v. State, 387 So.2d 963 (Fla. 1980).

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 19 United States Code §1581(a)

provides specifically that:

> "Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the custom waters or, as he may be authorized, within a customs enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within its district, and examine the manifest and other documents and papers and examine, any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Title 21 United States Code §955 Provides

inter alia, that it is:

> "unlawful for any person to bring or possess on board any vessel. . . arriving in or departing from the United States or the customs terri-tory of the United States, a controlled substance. . ."

Article I Section 12 of the Florida

Constitution provides that:

> "Searches and seizures.--The right of the people to be secure in their persons, houses papers, and effects

against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

IV.

STATEMENT OF THE CASE

The Defendant, Silvio P. Zafra, was charged by information with three counts consisting of one count of possession; one count of importation and one count of trafficking in marijuana, arising out of his attempt on October 10, 1980 to bring ashore one thousand (1000) pounds of marijuana in a twenty-five (25) foot speedboat at Crandon Park, Key Biscayne, Miami, Florida. The Defendant filed a motion to suppress, which the Florida trial court granted after a hearing.

At the hearing below the State produced three witnesses, United States Customs Officers Ogden, Carlin and Nasossis. The Defendant did not testify and produced no witnesses or evidence. United States Customs Officer Richard Ogden said that he had been trained by the Customs Service to intercept

contraband coming into the United States by plane and boat. A5. On October 10, 1980 he went on duty at six p.m. and began a routine survey of boats in the Crandon boat ramp area. A6-A10.

The customs officers at 3:00 a.m. encountered the Defendant's boat in customs waters. A11. It was undisputed below that the customs officer thereupon decided to conduct a routine customs boarding. A16 . Officer Nassosis checked the boat's papers. A44. Officer Ogden stepped on the trailer fender and looked into the boat. A16. The deck was much higher than the manufacturer had put in. A16. Ogden said that this was a characteristic profile of smugglers. A16. The trend among smugglers had evolved from throwing contraband into cabins, to stowing contraband into cabins, to stowing contraband in hidden compartments. A17. Ogden testified that

he observed marijuana residue on the boat carpet. A18. There was also a rise in the carpet evidently covering a hatch area. A18. Ogden testified that he considered this suspicious--the way the vessel was constructed there should not have been a hatch of that nature under the carpet tacked to the deck. A19. The boat had no fishing gear and had only tools and mechanics tools on the deck. A20. Ogden said he pulled the carpet back and an odor of marijuana was coming out. A22. The hatch was secured by screws. A22. In the hatch were twelve (12) bales of marijuana weighing one thousand pounds. A24.

Relative to the present petition, as noted above, the State's evidence was undisputed. In particular, United States Customs Officer, James A. Carlin

explained the presence of the United States Customs Officers at the Crandon Park boat ramps thus:

"[By the prosecutor]:

Q Turning your attention to October 10, 1980, had you started work that day or before?

A We started on the 9th at 6:00 p.m.

Q When you say, "we" to whom are referring?

A Myself, Officer Nasossis and Officer Ogden.

Q What was your duty for that period which you were working?

A We're assigned to the marine section on the night shift. So, basically we check boat ramps for any incoming vessels--the various boat ramps into the Miami area.

A What is the purpose of checking the boat ramps for the waterways? What is the relationship to Customs?

A Well, we check basically for boats coming from foreign countries.

> Boats coming into those ramps do have access to Custom waters. So, we check for documents and any undeclared items they might have."

A38-A39.

Based upon the foregoing and rejecting the State's argument based upon other factors that there was articulable suspicion, the trial court granted the Defendant's Motion to Suppress. See, State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982), rev. den., 418 So.2d 1281 (Fla. 1982). On appeal to the Florida District Court of Appeal, the District Court affirmed the trial court holding that there was no articulable suspicion herein and that United States Custom Officers could not board any vessel to check papers unless they could show a "border crossing" or unreasonable suspicion. Id.

The undersigned filed his petition

for certiorari from said decision contemporaneously with the Government's petition in United States v. Villamonte-Marquez, ___U.S.___, 103 S.Ct. 2573 (1983). In Villamonte-Marquez, this Court subsequently held that Customs Officers may lawfully board any vessel in customs waters to examine documents under 19 U.S.C. §1581(a) without articulable or reasonable suspicion. Id. On June 27, 1983, this Court therefore granted Certiorari, vacated the foregoing decision of the Florida District Court and remanded for further proceedings consistent with United States v. Villamonte-Marquez. Florida v. Zafra, ___U.S.___ 103 S.Ct. 3259 (1983).

On remand, the Florida Third District Court of Appeal permitted supplemental briefs on the effects of Villamonte-Marquez and permitted further

oral argument. See, A58. On January 24, 1984, the Third District Court again affirmed the suppression and dismissal by the trial court. State v. Zafra, 444 So.2d at 1064-1065; see, A59-A63. The District Court reasoned that United States v. Villamonte-Marquez was inapplicable because the Defendants had quickly taken their boat out to the water and (and it was no longer a boat?!?) and the Customs Officers were more interested in looking for narcotics than solely checking documents. Id. The Court also stated that the State had "conceded" that there was no articulable suspicion in the present cause[1].

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[1]·The Court's analysis that the State "conceded that there is no articulable suspicion herein is based solely upon the wording of the Court's original opinion in State v. Zafra, 408 So.2d 746. However, as reflected in the excerpt to the State's original brief on appeal, it states:

On February 8, 1984, the undersigned filed a vigorous Motion for Rehearing which was denied on February 29, 1984. See, A64-A70. On October 18, 1984, the Supreme Court of Florida denied review, with the Chief Justice Boyd and Justice Ehrlich dissenting [2]. See, A73. The Florida District Court however stayed its mandate pending review in this Court. See, A74; see, also, A71-A72.

(Footnote 1 continued)

> "Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon their observations, to board the vessel."
>
> Brief of State, at p.14.
>
> (see A54)

[2]. The fact that the Supreme Court of Florida may have severely limited jurisdiction to review this matter under Florida's recent constitutional amendment, see, Jenkins v. State, 385 So.2d 1356 (Fla. 1980), should not affect the proper exercise of this Court's jurisdiction. But see, Florida v. Rodriguez, ___ U.S. ___, 105 S.Ct. 308 (1984)(dissenting opinion).

V.

REASONS FOR GRANTING THE PETITION

A. Direct Conflict With United States v. Villamonte-Marquez.

Without conceding for a moment that it was in error in its original opinion, the Florida District Court again affirmed the judgment of the trial court below dismissing the present criminal charges upon the Defendant's Motion to Suppress. Rejecting United States v. Villamonte-Marquez, 462 U.S.___, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), permitting customs officers to board any vessel under Section 19 U.S.C. §1581(a), the Court reasoned that the evidence herein should be suppressed because the officers intended to look for illicit narcotics rather than solely engaging in a routine customs inspection. 444 So.2d at 1064-1065. (A59-A63).

The District Court's analysis that the customs officers in the case at bar had no authority to conduct the present search because the officers were also looking for narcotics, is in square conflict with the plain rejection of that theory in United States v. Villamonte-Marquez, 103 S.Ct. at 2577, note 3 wherein this Court clearly explains, thus:

> "There is no issue in this case concerning the activities of the officers once they boarded the Henry Morgan II. The only question presented to this Court concerns the validity of the suspicionless boarding of the vessel for a document inspection.
>
> Respondents, however, contend in the alternative that because the customs officers were accompanyed by Louisiana State Policemen, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marijuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in Scott v. United States, 436 U.S.

> 128, 135-139, 98 S.Ct. 1717, 1722-1724, 56 L.Ed.2d 168 (1978), and we again reject it. Acceptance of respondent's argument would lead to the incongruous result criticized by Judge Campbell in his opinion in United States v. Arra, 630 F.2d 836, 846 (C A1 1980): 'We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers.'"

The undersigned brought the foregoing footnote 3 to the attention of the District Court to no avail. See, A68.

Furthermore, the District Court's central position that the Customs Officers intended to board the boat because they suspected that it was carrying narcotics rather than boarding the boat to check "custom papers" is wholly contradicted by the record. The undisputed evidence from the only witnesses presented established that Officer Nasossis checked the boats papers, A44,

and that the officers boarded the boat because they decided to conduct a routine customs boarding. A16. As Customs Officer Carlin testified:

> "We informed the--well, I had what we call a Customs Raid jacket. It's a nylon windbreaker with the Customs badge, you know, embossed o it, and on the back it says, 'U.S. Customs' I think in two inch lettering. It has a Customs patch on each sleeve.
>
> So, they more or less knew who we were, but we identified ourselves with our badge holder in the case and told them we were from U.S. Customs and that we would like to inspect their vessel and check their documents on the vessel.
>
> Q What happened next?
>
> A I believe Mr. Zafra identified himself as the master of the vessel and he was asked for documents, I think, by--I believe Officer Nasossis who asked him for his documents in English, and I think I also asked him in Spanish, you know, to further clarify what we wanted."

A43-A44.

The present District Court opinion is

therefore a plain miscontruction of Villamonte and the express authority of 19 U.S.C. 1581(a) and 21 U.S.C. §955, which provides that it is:

> "unlawful for any person to bring or possess on board any vessel. . . arriving in or departing from the United States or the customs territory of the United States, a controlled substance. . ." [Emphasis added].

The present decision emasculates 19 U.S.C. 1581(a) and 21 U.S.C. §955 and makes a mockery of this Court's express consideration of the present issue and rejection of the District Court's analysis. The decision is also in direct conflict with the Eleventh Circuit Court of Appeals on the same issue. See, United States v. Albano, 722 F.2d 690, at 695 (11th Cir. 1984)("Customs officers may rely on section 1581(a) even though they may suspect the vessel of smuggling contraband"). In sum, the Florida Third

District Court of Appeal has told the United States Congress that it cannot do in Florida that which the face of 19 U.S.C. §1581(a) clearly states Congress intended to do: to give customs officers authority in "customs waters" to board vessels for document and customs examination, irrespective of whether they are also looking for contraband, which is expressly authorized under the companion section, 21 U.S.C. §955 in any event. This decision comes from the most active Court in Florida in search and seizure and boat cases because of its very proximity to the major sources of illicit marijuana and cocaine. See, e.g., Hanson v. State, 445 So.2d 378 (Fla. 3d DCA 1984)(citing State v. Zafra); State v. Doyle, 409 So.2d 1168 (Fla. 3d DCA 1982); Morales v. State, 407 So.2d 321 (Fla. 3d DCA 1981). At the same time, the present decision comes at a time when a major

federal and state strike force is operating in Florida to combat the grave problem of the narcotics traffick corridor through Florida, the State with the nation's largest coastline. See, "Select Committee on Narcotics Abuse and Control, 95th Cong. 2d Sess., Report on Problems of Law Enforcement and Its Effort to Reduce the Level of Drug Trafficking in South Florida" (Comm. Print 1978). The plainly erroneous decision of the District Court is therefore not only important to Florida, but is also of immediate, critical importance to federal law enforcement authority and to the security and safety of all citizens in virtually all states in this nation where drug trafficking is a problem. Additionally, the bizarre conflict which now exists between the highest federal court, see, e.g., United States v. Albano, supra, and the controlling state

court in the same jurisdiction can only be resolved by this Court. Indeed, the State submits that the present District Court has been difficult in its views on search and seizure[3]. See, Florida v. Rodriguez, ___U.S.___, 105 S.Ct. 308 (1984)(reversing the same Florida Third District Court of Appeals for the second time in the same case in as many years). The State has therefore no recourse but to respectfully request this Court's patient consideration again.

B. Conflict with Other Decisions of the United States Supreme Court.

Similarly, the District's Court's reasoning that it makes a constitutional

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[3]. It is for this reason that the sua sponte modification of the Eleventh Circuit's opinion in United States v. Herrera, 711 F.2d 1546 (11th Cir. 1984), See, 727 F.2d 1016 11th Cir. 1984), has had and will have no effect whatsoever upon the present opinion.

difference that the present vessel was quickly removed from the water, is absolutely contrary to the constitutional analysis in this Court's "fresh pursuit" and "authority to search" cases. See, e.g., United States v. Santana, 427 U.S. 38 (1975)(Defendant's flight into her home does not vitiate law enforcement officers authority to detain her acquired prior to her flight); Warden v. Haden, 387 U.S. 294 (1967)(same); Illinois v. Andreas, ___U.S. ___, 103 S.Ct. 3319 (1983) (Authority to search container acquired at an earlier point in time carried through and attach to the time the container was again subsequently opened); Illinois v. Lafayette, ___U.S.___, 103 S.Ct. 2605 (1983)(search pursuant to lawful arrest attaches at the time of arrest and is still valid even though conducted later at station); United

States v. Ross, ___U.S.___, 102 S.Ct. 2157 (1982)(Authority to search container acquired at an earlier point in time carried through and attaches to the time the container was again subsequently opened); Illinois v. Lafayatte, ___U.S. ___, 103 S.Ct. 2605 (1983)(search pursuant to lawful arrest attaches at the time of arrest and is still valid even thought conducted later at station house). The singular rule of the foregoing decisions is that a change in position by the defendant or the thing to be searched from the position in which the officer acquired the authority to lawfully search, is not constitutionally significant. A fortiori, the fact that a defendant or

defendants may be very clever and quick about removing their boat from the water does not defeat the right of customs officers to demand papers and search for narcotics. See, United States v. Ross; Illinois v. Lafayette; Illinois v. Andreas, supra. The opinion of the District Court is in direct conflict with these decisions and the Court has therefore completely misapplied and misconstrued the federal constitution. See, Art. I, §12 Fla. Const.

Furthermore, the State would assert that the federal officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, Florida v. Royer, ___U.S.___, 103 S.Ct. 1319 (1983); United States v. Cortez, 449 U.S. 411 (1981); see, also, United States

v. Mendenhall, 446 U.S. 544, (1980) (approving use of profile characterics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973)(approving use of "profile" characteristics at border search). In Cortez, the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information form police reports, if such are aailable, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these date, a trained officer draws inferences and makes deductions--inferences and deductions that might well elude an untrained perrson." [Emphasis added].
>
> 449 U.S. at 418.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck. When the officers so clearly had probable cause to search the hold, the warrantless search was obviously justified by the exigency exception for vehicles and boats. See, United States v. Ross, ___U.S.___, 102 S.Ct. 2157 (1982); Carroll v. United States, 267 U.S. 132 (1925); See also, Chambers v. Maroney, 399 U.S. 42 (1970).

The Florida District Court's flat rejection of the State's argument upon articulable suspicion which was based upon the customs "profile" and the observations, training and experience of the officers, is patently erroneous in the face of the correct constitutional analysis in Royer, Mendenhall, and

Cortez. The fact that the events transpired in the proximity of a border is also a fact, which the Florida courts erroneously absolutely refused to credit. See, Cortez. The Florida District Court's erroneous analysis of "profiles" reasonable suspicion and "boat" law is an extension of the same erroneous analysis in Florida v. Rodriguez. See, also, Florida v. Royer, 460 U.S.____ (1983).

Finally, the State submits that the cause herein is in direct contravention to the good faith analysis of this Court in Michigan v. DeFillippo, 443 U.S. 31 (1979) where despite the unconstitutional nature of the statute this Court nevertheless sustained the seizure where the officers were relying in good faith upon the statute and its validity. The federal officers herein were relying upon

19 U.S.C. §1581(a) and that, which the statute plainly says the officers can do: board any vessels in customs waters for document and customs inspection. For Florida and all federal customs officers in state court, the present ruling squarely conflicts with Michigan v. DeFillippo. Moreover, the officers' good faith reliance upon their observations, training and experience to conclude that a detention was necessary, presents a circumstance herein of plainly non-egregious police conduct, to which the harsh penalty of the exclusionary rule should find no application. See, California v. Mingares, 443 U.S. 916 (1981)(Rehnquist, J. and Burger, J., dissenting); Stone v. Powell, 428 U.S. 465, at 496-502 (1976)(Burger, J., concurring); Id, at 537-542 (White, J., dissenting); Brewer v. Williams, 430 U.S.

419, at 420-429 (1977)(Burger, J. dissenting); Brown v. Illinois, 422 U.S. 590, at 610-612 (Powell, J. concurring); United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc), cert. den., 449 U.S. 1127 (1981).

VII

CONCLUSION

The present opinion is in direct conflict with United States v. Villamonte-Marquez and another decision in the same jurisdiction of the Eleventh Circuit Court of Appeals upon an important issue of federal law regarding the authority of federal officers. The District Court has refused to follow federal law and the paramount federal interest in maintaining the integrity of the borders and "customs waters" of the United States. At the same time, this present decision of the Florida Third District Court is binding on all Florida trial courts see, State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976), and emanates from the leading Florida state court in the construction and analysis of "boat" law and drug courier case law.

Florida has the greatest coastline of any state and a grave interest in the consistent interpretation of "boat law." The present decision's direct adverse effect upon a national federal and state effort in Florida to stem the tide of drug traffic in Florida cannot be gainsaid. The inconsistent and erroneous analysis of the Florida District Court presents a conflict on a matter of substantial public and national importance. The present cause presents a most cogent and timely case on the question of federal officer's authority under 21 U.S.C. §955 requiring customs officers to seize contraband, consistent with their primary statutory authority.

This Court therefore plainly has jurisdiction herein and should exercise

exercise its jurisdiction for these, "special and important reasons." See, Sup. Ct. R.17.

RESPECTFULLY SUBMITTED on this ____ day of December, 1984, at Tallahassee, Leon County, Florida.

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APPENDIX

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IN THE CIRCUIT COURT
OF THE ELEVENTH
JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY,
FLORIDA
CRIMINAL DIVISION

THE STATE OF FLORIDA)
Plaintiff,)
vs.) No. 80-19386
SILVIO ZAFRA,)
Defendant,)
- - - - - - - - - - - -)

Metropolitan Justice
Building,
Miami, Florida
Friday, 9:00 a.m.,
February 20, 1981.

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The above-entitled case came on for motions before The Honorable James R. Jorgenson, Circuit Judge, pursuant to Notice.

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APPEARANCES:

JANET RENO, State Attorney, by
ELYSE TARG, Assistant State
Attorney.
Attorney for Plaintiff.

ROSEN, PORTELA, BRONIS, ANGUEIRA,
& CLAY, by WILLIAM A. CLAY, Esq.
of counsel.
Attorneys for Defendant.

[PREHEARING DISCUSSION OF ATTORNEYS OMITTED]

RICHARD D. OGDEN was called as a witness and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TARG:

Q Would you please state your name and official capacity for the record.

A Richard D. Ogden. I am a patrol officer for the United States Customs Service.

Q How long have you been so employed as a Customs Patrol Officer?

A For approximately eighteen months.

Q Pursuant to that job, did you have any training?

A Yes, ma'am, I did.

Q What training was that?

A I attended a seven-week integrated law enforcement course of the Federal Enforcement Center in Glencoe, Georgia. In addition, I attended a four and a half week course at the same location, which dealt with specific duties assigned to Customs Patrol Officers.

Q Officer, what are the duties of a Customs Patrol Officer--and, for the record, I will use a CPO.

What are the duties of a CPO?

A To intercept the flow of contraband coming into the United States, primarily narcotics, and to enforce other customs and related laws.

Q Are your powers basically dealing with boats, airplanes or what?

A Yes, ma'am.

A high percentage of our work deals with boats and aircraft coming into the country.

Q Were you employed on August 10, 1980?

A Yes, ma'am.

Q Were you employed as a CPO then?

A Yes, ma'am.

Q Did you come on to duty that day?

A I came--reported for duty at 6:00 p.m. on October 9.

Q What were you going to do that night?

A Generally that night we conducted a routine survey--myself and my partners --of the public boat ramps situated in the local Miami area going from Key Biscayne up to Bakers Haulover and making an analysis on the different types of trucks and boat trailers parked at these locations.

Q How many boat ramps did you investigate that night, approximately?

A Approximately eight.

Q At any of these ramps did you notice anything unusual or was anything brought to your attention?

A Yes, ma'am.

Q What was that?

A At Crandon Boat Ramp, I would estimate at approximately eight to nine p.m. that evening, we observed two pick-up trucks with trailers attached which attracted our attention.

Q Why did they attract your attention?

A Based on my prior experience as well as the documented experience of all the other officers in our office, this particular trailer, which was a three axle float on, fit somewhat of a profile commonly used in smuggling activities.

Q Why did this seem suspicious? What was it about this type of trailer

which seemed suspicious?

A That this particular type of trailer has the capability of carrying a very large vessel as opposed to what would be used just for fishing around the bay.

The vessel generally carried on this type of trailer has long range capabilities and they are generally very wide vessels.

Q Have you ever made any seizures involving these typical-type trailers?

A Yes, ma'am.

Q Approximately how many?

A I would estimate approximately twelve to fifteen.

Q When you have made these types of seizures, have you found contraband, drugs and the like?

A Yes, ma'am.

Q Do you know of any other seizures

made of these types of trailers involving contraband?

A Yes, ma'am.

Q How many, approximately?

A Throughout our office I would say there has been several dozen made, or more, in the eighteen months I have been employed there.

Q Officer, you stated that you saw that first at eight o'clock.

What did you do after you noticed it?

A We first observed it at approximately eight o'clock that evening. It was the only truck and trailer at the local ramps which had any potential as far as we were concerned.

We established a surveillance on the truck and trailer at the Crandon boat ramp.

Q Did you sit on it? Did you watch it all night or did you do anything during that time?

A To the best of my recollection, we did not sit on the truck and trailer immediately after we spotted it.

We more or less made a note on it, checked the other ramps and then came back.

Q When was the next time you saw this particular trailer?

A I would imagine about an hour and a half, maybe two hours after we first observed it, we came back to it.

That's just a rough estimate.

Q Did you see anything at that time?

A No, ma'am.

It was in the exact position and place as we had left it.

Q What did you do then?

A At that time we established a surveillance on the truck and trailer, parked our vehicle somewhat in a darkened area of the parking lot and just sat and waited.

Q Did you see anyone approach that trailer later on, either that night or the next morning?

A Yes, ma'am.

Q Approximately when was the next time you saw somebody approach that trailer?

A The first and only time we saw someone approach that trailer was when one of two persons boarded the 25 foot Bertram, which arrived at Crandon Marina.

Q What time was that, approximately?

A I believe that was a little after three o'clock in the morning.

Q Was that on October 10?

A Yes, ma'am.

Q Was the length of time between which you had first seen it and the fact that it was three o'clock--did that affect you in any way?

[OBJECTION OVERRULED].

A Yes, ma'am.

Q How so?

A From the time we first spotted the truck and trailer until the time someone approached it, it was nearly seven hours.

That, to me, aroused my suspicions in that it would have been an unusually long fishing trip, in my opinion.

Q Would it have any other influence on you, as to the length of time?

A Yes, ma'am.

We have made notes in our office and calculated on several occasions that it generally takes vessels approximately four and a half to five hours to go from here to any of the islands in the Bimini area and to return. This affected my thinking in that they had more than sufficient time to go to any of the islands, which could be used as a stash site--and there are intelligence

bulletins that we have which indicate that that is a common method--store the marijuana on a vessel and return.

Q Did you have occasion to see anybody on the boat?

A Yes, ma'am.

Q Who was that?

A The defendant, Mr. Siovio Zafra, and one other individual.

Q Did anything about those two people arouse your suspicions?

A When we first initially spotted the vessel arriving at the dock, I really could not see them all that well. We did notice that there were two persons, as they brought the boat out of the water and, as we approached, there were several things which caught my attention.

Q What was that?

A First of all, it was quite evident right off, once I got close enough, that

both of the individuals were Latin.

Q Was there anything suspicious about that?

A Not suspicious. Only in that we do make a lot of arrests and seizures with boats loaded with marijuana which are manned by two or usually two or three Latin males.

Very rarely, in fact never, have I participated in one that I recall with a woman on board or children or where both individuals were Americans.

Q What about blacks--have you ever made a seizure where there are blacks?

A I believe perhaps on one occasion.

Q In terms of the experience of Customs Officers with which you are familiar, do you know what percentage of their seizures are made in cases where there are Latin males?

[OBJECTION SUSTAINED]

[DISCUSSION OMITTED].

Q Officer Ogden, was there anything else about the appearance of these two Latin males which you found to be suspicious?

A Yes, ma'am.

Q What was that?

A On the initial glance at the two individuals they appeared to be somewhat--excuse the term--weatherbeaten. They looked like they had been out for some time engaging in perhaps heavy work or something.

Their clothes were somewhat dirty. They just looked like they had really been worked over.

Q Did there come a time when you stopped the two individuals?

A Yes, ma'am.

Q When was that?

A A few minutes after we first stopped the boat coming up to the dock.

Q What was the purpose of the stop?

A The purpose of the stop was to conduct a routine Customs boarding.

Q Pursuant to that, what did you do?

A My two partners went up to talk to the individuals and to obtain the necessary registration forms. I went to the vessel, which was already aboard the three axle float-on trailer and had already been pulled out of the water. I stepped on the fender above the wheels of the trailer and looked over the gunwale of the vessel into the boat.

Q At that time did you notice anything unusual about that boat?

A Yes, ma'am.

Q What was that?

A I noticed that the main deck of the vessel was considerably higher than what I would believe the manufacturer would have put it. This is also a profile

which has become quite common among smugglers.

The trends have changed over the years. They have gone from just throwing it into the cabin and loading it in remote spots along the coast to using secret compartments and bringing it on to the public boat ramps.

Q Have you ever encountered boats like this in your experience?

A Yes.

Q Have you encountered contraband in these boats?

A Yes, ma'am.

Q How many seizures have you made in boats of this type?

A I would say approximately maybe fifteen.

Q What did you do next?

A I climbed aboard the vessel, took a quick glance into the cabin area to

assure myself that there was no other persons on board the cabin, and it was more or less a visual--just a quick visual check.

I looked down at the deck and got down on my hands and knees where I could get a closer look at it.

I had one flashlight and I did observe marijuana residue embedded in the carpet.

You could not see it until you got down on your hands and knees and looked really close and spread the pieces of carpet, you know, apart.

Q Did you find anything else?

A Yes, ma'am.

Prior to finding the residue, I did run my hand over the carpet itself in an effort to determine if I could feel anything underneath and I did feel what appeared to be a small rise underneath the carpet.

Due to its shape and size it led me to believe that there was a hatch underneath the carpet.

Q This was covered by the carpet though?

A That is correct.

Q In your experience, was that suspicious?

A Yes, ma'am, it was.

Q Why?

A Because, the way the vessel was constructed, there shouldn't have been a hatch of that nature under carpet tacked down to the deck.

Q Was there anything else about what you saw on the deck of that boat which made you suspicious?

A Yes, ma'am. There were several tools and a lot of odds and ends on the deck that really had nothing to do with any fishing expedition, as far as I could

tell--the tool boxes, odds and ends, mechanics' tools and things that I, ordinarily, would not expect to see on a boat, especially for a fishing expedition.

To the best of my recollection, there was no fishing gear on board the boat. I believe there might have been an ice chest, but I didn't see any fish nor did I see any bait.

Certainly anyone engaging in a fishing trip for six or seven hours would, in my opinion, at least come back with something.

Q What led you to believe that these people might have been on a fishing trip?

You said that anyone on a fishing trip would have had something there.

What led you to believe that they might have been on a fishing trip?

A Generally--it was just an assumption on my part at that point that they were.

Generally, when we stop boats and ask the routine questions, they generally are fishing or they're taking the boat out for a test run to test it out.

Q In your experience, when you find this residue on the ground what do you usually find?

A Usually when we find residue, in my experience, we'll either find a stash of marijuana on the vessel or we'll find a secret compartment which has other residue in it which is an indication that perhaps at one time or another it did carry marijuana.

Q What did you do after you have gotten down on your hands and knees?

A After I had gotten on my hands and knees and picked up a little residue and saw the incongruency in the deck below the carpet, I asked my partner, Richard Nasossis, to come aboard the vessel and give me a hand.

Q Did he?

A Yes, ma'am, he did.

Q What happened then"

A I told him what I had found and he agreed that there was definitely something amiss.

We pilled back the carpet off the deck, wnich was--it was just lightly tacked down with a little adhesive, and he put his nose---

We did find a hatch. It was basically rectangular in shape and secured by probably a dozen or more screws.

He got down on his hands and knees and put his nose to one of the seams in the hatch and took a whiff and came up and said yeah--he could smell what he thought was marijuana.

Q What did you do then?

A We proceeded to remove the screws from the hatch and lifted the hatch and

the marijuana was visible--immediately visible--below the deck.

Q Have you seen marijuana before?

A Yes, ma'am.

Q To your trained eyes, this was marijuana?

A Yes, ma'am.

Q Did you run any test on it?

A Yes, ma'am, we did run a field test.

Q What did you do?

A We have a small test tube filled with a chemical agent which, when exposed to THC, which is in marijuana and hashish, will turn bright red.

We removed a few leaves. I tore open one of the bales and removed a few leaves and a couple of seeds, put them in the tube, mixed it with the chemical, shook it up, and it tested positive and turned bright red.

Q How much marijuana was there?

A We found twelve bales and we estimated the weight to be approximately 1000 pounds.

These were somewhat large bales.

Q Did all of this take place in Dade County, Florida?

A Yes, ma'am.

MS. TARG: The State has no further questions of this witness.

THE COURT: You may inquire.

CROSS EXAMINATION

BY MR. CLAY:

Q Officer Ogden, is it not true that you and the other two Customs Patrol Officers with you on the day and night and morning in question were together throughout all of your law enforcement activities?

A That's correct.

Q Is it not also true that enforcement

of the laws of the State of Florida is not within the scope of your authority?

[OBJECTION OVERRULED].

A If we come across violations of Florida law in our efforts, then we do make detentions as necessary and turn them over to the local authorities.

Q That would be incidental to your investigating a federal customs violation?

A That's correct.

Q But you would not be conducting a search for violations of Florida law, would you?

A No, sir, we wouldn't.

Q Is it not true that you and the other two Customs Patrol Officers, while you were still in the surveillance van, made the decision that you were going to board this particular boat?

A That's correct.

A That's correct.

Q Is it not true that the van in which you were located and from which you were making some observations was approximately 100 yards from the boat, the trailer and the truck, which you have been describing?

A Approximately, give or take a few yards.

Q After making the decision in the van to approach these men and board the boat, I assume all three of you officers got out of the van and commenced to do what you had planned to do?

A That's correct.

Q Your primary role was to climb up on the trailer and climb up on the boat and get inside the cockpit of the boat, was it not?

A I wanted to take a look in the cabin area to assure myself there were no other

persons there.

Q But you went directly to the trailer and to the boat?

A Went directly to the trailer and stood up and looked in the boat.

Q While you were doing that, the other two Customs Patrol Officers were involved in some other activity?

A That's correct.

Q Is it not true that Customs Patrol Officer Carlin was suffering from a back injury, specifically a slipped disc, and he lagged a little bit behind?

A That's correct.

Q You have been testifying regarding three axle trailers and some type of a profile associated with it.

Is it not true that three axle trailers or four axle trailers are just as consistent with being used by innocent boat owners who happen to have

large boats that necessitate that type of trailer equipment? Is that not true?

A Yes, sir.

Q There is nothing uniquely specific about three wheel or three axle or four axle trailers which inevitably point to involvement in drug smuggling, is there?

A They dictate a strong possibility in our opinions, but it's possible that they're--I'm sure that they're used by innocent persons.

Q Would you not agree that probably there are more three and four axle boat trailers used innocently--than pursuant to a criminal venture?

[OBJECTION OVERRULED].

A I would say that a large percentage of them are probably innocent.

That's hard to say.

Q Sir, are you saying that you and the other Customs Patrol Officers first

observed the truck and trailer in question in this case at 8:00 p.m. on the night in question?

A Or thereabouts--eight or nine o'clock.

Q That would essentially be the first involvement of you and the other officers in this case, would it not?

A That would be the first time we sighted it--right--and made a note of it.

Q Did I understand you to say that it is your experience that the typical or customary time it takes a vessel to travel from, let us say, Crandon Marina to the Bimini area and return in four to five hours?

A Approximately four and a half to five hours.

Q When you made your observations of this vessel, you had absolutely no idea what kind of engine it had in it, did you?

A No, sir, I didn't.

Q You did not know whether it would be a diesel engine that might be capable of producing approximately a forward speed of eight to ten knots, or some type of high speed engine. Correct?

A That's correct.

Q Obviously the time it would take to go from Miami to Bimini and return would be completely dependent upon the kind of engine a particular boat has. Correct?

A The kind and the fuel capacity, right.

Q You had no knowledge of any of those factors?

A No, sir, I didn't.

Q Did I understand you to say that you and the other officers were traveling around Dade County and checking out various boat ramps and marinas?

A We checked a total of about eight

ramps ranging from the Crandon boat ramp, Key Biscayne, to the public boat ramp at Bakers Haulover.

Q You have testified regarding the appearance of Mr. Zafra and the other individual as weatherbeaten and having dirty clothes.

A That's correct.

Q Do you recall testifying in a deposition on January 30, 1981, in this case?

A Right.

Q You were under oath, of course?

A Right.

Q Is it not true that you made absolutely no mention of the alleged appearance of these men as being weatherbeaten and wearing dirty clothes?

[OBJECTION SUSTAINED].

Q Did you prepare a report in this particular case?

A I did not. No, sir.

Q Do you own a Bertram boat yourself?

A No, sir, I don't.

Q Do you own any boat?

A No, sir, I don't.

Q Have you ever owned a Bertram?

A No, sir.

Q You have you ever been on one?

A Yes, sir.

Q How many times?

A Half a dozen.

We have one at work.

Q This particular Bertram boat in this case is an older Bertram, is it not?

A Yes, sir, I believe it is.

I think it's a 1975 or something.

Q You know enough about boats that they were constructed in a heavily built fashion a few years back than they are today, do you not?

A Right.

Q Correct?

A That's correct.

Q The whole structure and thickness of the fiberglass is a lot thinner today than it was even two, three, four, five years ago?

A That's correct.

Q You have never been to the Bertram factory, have you?

A No, sir.

[OBJECTION OVERRULED].

Q You never studied any Bertram manufacturer specifications, did you?

A No, sir, I haven't.

Q In fact you never had any experience with this type and this year of Bertram vessel before, did you?

A Not to the best of my recollection.

Q After you went directly to the vessel and the trailer, climbed up to the fender, did you then climb into the boat?

A After a few seconds pause looking

in the boat--the initial, visual contemplation of the deck area.

Q You never asked any questions of Mr. Zafra or of the other individual, did you?

A No, sir, I didn't.

Q The other individual was a Mr. Sanchez?

A That's correct. I believe so.

Q You observed the raised deck after you climbed to the fender of the trailer?

A That's correct.

Q The fender and the trailer would be about two and a half to three feet above the ground?

A I don't believe it would be quite that high. It would be---

Q Or pretty close to it?

A Maybe eighteen, twenty inches.

Q Prior to climbing aboard the trailer and viewing the deck of the vessel, you

were unable to see those portions of the vessel, were you not, from the ground level?

A That's correct.

Q It was absolutely necessary for you to climb up in order to get the proper vantage point to see in?

A That's correct.

Q After climbing up in that fashion and observing for a few seconds with a flashlight, you climbed aboard the vessel and got into the cockpit?

A That's correct.

Q You then flashed your light into the enclosed or walled off cabin?

A Yes, sir.

Q That is when you then got down on your hands and knees and commenced a close examination of the fibers of this indoor/outdoor carpet?

A That's correct.

Q Before climbing aboard the trailer, climbing aboard the boat, commencing the inspection of the carpet in a hand and knees fashion, pulling up the carpet, getting tools and unfastening the secret hatch, did you ever ask Mr. Zafra or Mr. Sanchez whether they had any articles aboard the boat which might be subject to the custom laws in the United States?

A No, sir, I didn't.

MR. CLAY: I have no further questions.

[REDIRECT AND RECROSS EXAMINATION OMITTED]

[DIRECT EXAMINATION: WITNESS, JAMES A. CARLIN].

THE COURT: Who is your next witness?

MS. TARG: Officer Carlin.

Thereupon:

JAMES A. CARLIN

was called as a witness and, having been

previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. TARG:

Q Officer, would you please state your name and official capacity for the record.

A James A. Carlin, Customs Patrol Officer assigned to the Miami District.

Q How long have you been so employed?

A A little over two years.

Q Prior to that time, what was your employment?

A I was a lieutenant with the Canal Zone Police in the Panama Canal zone.

Q For how many years?

A Thirteen.

Q Have you had any training in customs work?

A Well, due to my past experience as a police officer, I went to the advanced phase of the Custom School, which is in Glencoe, Georgia.

Q What kind of courses did you take there?

A Search and seizure, constitutional law, Miranda warnings, search of vessels and those types of customs-related tasks.

Q Turning your attention to October 10, 1980, had you started work that day or before?

A We started on the 9th at 6:00 p.m.

Q When you say, "we" to whom are you referring?

A Myself, Officer Nasossis and Officer Ogden.

Q What was your duty for that period which you were working?

A We're assigned to the marine section

on the night shift. So, basically we check boat ramps for any incoming vessels--the various boat ramps into the Miami area.

Q What is the purpose of checking the boat ramps for the waterways? What is the relationship to Customs?

A Well, we check basically for boats coming from foreign countries.

Boats coming into those ramps do have access to Customs waters. So, we check for documents and any undeclared items they might have.

Q What are Customs waters?

A Three miles out.

Q That night, turning your attention to October 10, did you see anything unusual?

A We noticed an older model pickup truck--I believe it was a 1971--at the Crandon Park boat ramp with a large

trailer on it.

We call it a Tandrum trailer. We call it a three axle, but it refers to three wheels on each side. So, it would be a six wheel trailer.

Normally these types of trailers do carry larger boats. So, we were sort of interested in this trailer.

Q Did you look at the truck which was there, too?

A Yes, ma'am.

Q Was there anything unusual about the truck, in your mind?

A Well, it was an older model truck.

In our experience with contraband or the smuggling of drugs, they go from one extreme to the other. They either have a pretty fancy truck, pretty fancy rig, or it seems they go to the other extreme and it's an older truck with a newer model trailer, of course.

Q Is that what you found that night?

A Yes, ma'am.

Q Did you ever see anybody approach that railer and truck?

A Yes, ma'am.

At approximately 3:10 a.m., on the 10th, a vessel came into the deck at Crandon Park and an individual did walk to the truck from the vessel.

Q What happened?

A The truck was backed up, the truck and trailer were backed down to the vehicle, at which time, give or take a few minutes, the Dade County Patrol Officer drove up in his vehicle and he went over to the vessel at the dock.

They were parked at a distance away, but apparently he was talking with the individuals and he started to walk away from the vessel on the dock there, at which time we drove up in our truck, got

out of the vehicle and approached the vessel.

Q Did you notice how much time it took for the people to tie up the boat to the trailer and hitch?

A I would say--you mean, to actually trailer it up and get it out of there?

Q Yes.

A Probably fifteen minutes.

Q Was there anything unusual about this, in your mind?

A They knew what they were doing.

In my experience of checking these ramps, it seems that a lot of the people seem to have a naturally hard time trailering their boats up. It's hard for them to line them up and get them on the trailer straight and everything else, and these gentlemen seemed to know what they were doing. They got it on rather rapidly and---

Q Was that suspicious to you?

A Well, it arose my suspicion because normally the people that do get involved in contraband seem to be more proficient at trailering a boat than the normal, everyday fisherman does.

Q Was there anything else about the boat or the people in it that arose your suspicions?

A There were only two people on board and---

Q What was suspicious to you about that?

A Normally a person who would be involved in with what we are involved in--contraband--that would involve two or three people on board.

Very seldom do you see a family or kids or anything of that nature on a boat that is involved with this type of thing. It's rare, anyway.

Q What did you do?

A As we approached in the vehicle, Officer Butchko, who was the Dade County man there, was sort of--I think he was getting ready to leave, and we identified ourselves as Customs Officers to him and we approached the vessel.

We informed the--well, I had what we call a Customs Raid jacket. It's a nylon windbreaker with the Customs Raid jacket. It's a nylon windbreaker with the Customs badge, you know, embossed on it, and on the back it says, "U.S. Customs" I think in two inch lettering. It has a Customs patch on each sleeve.

So, they more or less knew who we were, but we identified ourselves with our badge holder in the case and told them we were from U.S. Customs and that we would like to inspect their vessel and check their documents on the vessel.

Q What happened next?

I believe Mr. Zafra identified himself as the master of the vessel and he was asked for documents, I think, by--I believe Officer Nasossis who asked him for his documents in English, and I think I also asked him in Spanish, you know, to further clarify what we wanted.

At that time I returned to our vehicle to begin filling out a search and boarding form, which we routinely do in most cases involving Customs seizures.

MS. TARG: I have no further questions of this witness, Your Honor.

CROSS EXAMINATION

BY MR. CLAY:

Q Officer Carlin, as I understand it, you had a slipped disc or a back injury which kind of disabled you a little bit?

A Yes, sir.

Q Climbing in and out of the van was a little more difficult for you than it was for the other gentlemen with you?

A Right.

Q Did you lag behind when the three of you decided to get out of the Customs van?

A Right, plus I was driving the van so, by the time I secured it, put the brake on and everything else, they had already gone out.

I was probably a few steps behind them.

Q Is it not true that Customs Patrol Officer Ogden went directly to the trailer and boat, climbed onto the trailer and then climbed aboard the vessel?

A I believe there were a few preliminary questions first, but I'm sure Ogden was the first one on board.

He didn't actually just walk up and jump on per se, but he did go on shortly thereafter, after a few preliminary questions.

"We're from Customs. We want to check your documents."

Q Officer Ogden was already up on the trailer at the time you came up to Mr. Zafra and Officer Nasossis?

A I'm not sure. I don't think he got on quite that fast.

Q Are you guessing on this or do you know?

A I would say no.

Q You testified regarding the significance of this truck being an older truck. Correct?

A Yes, sir.

Q Would you not agree that the fact that this was an older truck is just as consistent with somebody who is an

innocent owner or user of the truck as it is with somebody who is a person who is criminally involved in the smuggling of contraband?

A Yes, sir.

We see lots of vehicles there that, just like you're saying, are not involved in this type of activity.

Q You would agree that there are probably more older trucks used by people innocently than there are used by people involved in smuggling, would you not?

A Sure. I'd have to say that.

Q Regarding the proficiency of these two men at trailering a boat, is it not true that this proficiency and the short period of time it took them to trailer the vessel in this case is just as consistent with a couple of men who were innocent, experienced boaters and fishermen?

Is that not true?

A Yes, but it's a proficiency seldom displayed on the ramps in South Florida by the average, everyday person.

For some reason, they have a hard time getting their boats on the trailer.

Q Mainly it depends on how many beers they have while they are out doing some boating?

A Could be.

Q The proficiency is just as consistent with an innocent man as with a smuggler?

A Yes, sir.

Q In the course of your duties, you observed many people who were out boating in the evening and fishing in the evening, did you not?

A Yes, sir.

Q Boats coming back to dock in the middle of the night or the early morning

hours is certainly not unusual for fishermen or boaters, is it?

A One thing that was unusual---

Q But my question is---

[OBJECTION OVERRULED].

Q My question is: Night fishing and night boating is not something unusual, is it?

A No, sir.

Q Would you describe your role in the case as a relatively minor one in light of the fact that you had a back injury?

A Yes.

Normally we take our turns in boarding vessels and getting directly involved but, because of the injury, I filled out the boarding form and the paperwork-type angle of it that night.

Q Would you not agree, sir, that there was nothing unusual about this particular 25 foot Bertram or the two

men, Zafra and Sanchez, prior to their being stopped, detained and the boat being boarded and searched?

A The only thing unusual about it--- it had been out for quite a long time.

We first observed it at about 8:00 p.m. on the 9th, and it came back at about 3:00 p.m. on the following morning.

That's quite a time lapse to be out in the bay itself. Normally you don't stay out for that many hours.

That's the only factor.

Q So, your answer would be that there was nothing unusual, other than the time lapse that the boat was out?

A No, sir. Yes, that would be my answer.

Q Obviously you have no knowledge whatsoever of whether the boat broke down or was out for that long a period

of time due to an engine breakdown, do you?

A No, I don't.

Q The fact that the boat was out of your sight for seven or eight hours is just as consistent with innocent fishing or an innocent, down on his luck boat owner whose boat breaks down out there on the bay?

A Yes, sir.

MR. CLAY: Nothing further.

[REDIRECT AND RECROSS EXAMINATION OMITTED].

[EXCERPT: ARGUMENT OF PROSECUTOR]
[1. Customs Search]
MS. TARG: I will argue that it was a Customs search and, in determining whether the search was good or not good, you just have to look at the federal law on searches and the federal law on boarding on vessels.

Customs authority 19 U.S.C. 1581A provides that Customs has a right to board any vessel in Customs water to ask for documents or other papers regarding the boat within twelve miles of the coast of the United States, and this boat was seen coming from the waters.

The officers testified that it was only a few miles outside the Atlantic Ocean. It was clearly in Customs waters.

* * *

[2. Articulable Suspicion]
The Court cases have held that, in deciding whether there is reasonable suspicion, a Customs Patrol Officer is

entitled to assess the facts in the light of their experience, and you must look at the totality of the circumstances.

We would, for those reasons, argue that the test to be given is: Did these CPO's, in their experience in the Customs Service, have articulable facts together with rational inferences from these facts to engender a reasonable suspicion that the vessel in this case was being used for narcotics trafficking and, again, we rely on those cases and on U.S. versus Brignoni-Ponce, a Supreme Court case cites at 95 Supreme Court 2574.

[EXCERPT OF STATE'S INITIAL BRIEF ON APPEAL TO FLORIDA 3d DCA]

B. Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon both their experience with smugglers and their observations, to board the vessel. See, United States v. Cortez, ___U.S.___, 101 S.Ct. 690 (1981); see, also, United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1879, 64 L.Ed.2d 497 (1980) (approving use of profile characteristics); United States v. Forbicetta, 484 F.2d 645, 646 (5th Cir. 1973) (approving use of "profile" characteristics at border search). In Cortez the Court repeated its approval of an officer's use of his experience for probable cause and articulable suspicion thus:

> "The idea that an assessment of the whole picture yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment

> must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions --inferences and deductions that might well elude an untrained person." Emphasis added. 101 S.Ct. at 695.

Additionally, after the officers were on the vessel, they certainly acquired probable cause to search the hold from the presence and smell of marijuana on the deck. [Citations Omitted]. When the officers so clearly had probable cause to search the hold, the warrantless search was obviously justified by the exigency exception for vehicles and boats. See, Carroll v. United States, 267 U.S. 132, 54 S.Ct. 280, 69 L.Ed. 543 (1925), adopted by statute in Florida Statute §933.19. See also, Texas v. White, 423 U.S. 67,

96 S.Ct. 304, 46 L.Ed.2d 209 (1975); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419 (1970); State v. Lopez, 369 So.2d 623 (Fla. 2d DCA 1979). In Chambers v. Maroney, the Court explained the exigency requirement thus:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant (sic) is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment". [Emphasis added] 399 U.S. at p. 51-52.

Undoubtedly the exigency exception to the warrant requirement was manifest in the

case at bar. The trial court's suppression of the evidence is therefore erroneous even under traditional search and seizure analysis and must be reversed.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1983
FRIDAY, OCTOBER 28, 1983

THE STATE OF FLORIDA, **
Appellant, **
vs. ** CASE NO. 81-474
SILVIO P. ZAFRA, **
Appellee. **

The cause is set for oral argument upon the mandate of the Supreme Court of the United States on Monday, December 12, 1983 at 10:30 o'clock A.M. with twenty (20) minutes being allowed each side to present oral argument. The parties may submit supplemental briefs twenty (20) days from date hereof.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1984

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 81-474

SILVIO P. ZAFRA, **

Appellee. **

Opinion filed January 24, 1984.

An Appeal from the Circuit Court for Dade County, James R. Jorgenson, Judge.

Jim Smith, Attorney General, and Calvin L. Fox, Assistant Attorney General, for appellant.

Paul Morris; Rosen, Portela, Bronis, Angueira & Clay and William A. Clay, for appellee.

Before HUBBART, C.J. and BARKDULL AND SCHWARTZ, JJ.

On Mandate of Supreme Court of
the United States

PER CURIAM.

This cause is before us pursuant to the mandate of the Supreme Court of the United States in Florida v. Zafra, 462 U.S. ___, 103 S.Ct. 3529, 77 L.Ed.2d 1382 (1983), which vacated our decision in State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982), rev. denied, 418 So.2d 1281 (Fla. 1982), and remanded the cause "for further consideration in light of United States v. Villamonte-Marquez, 462 U.S. ———[,103 S.Ct.2573, 77 L.Ed.2d 22] (1983)." In that decision the Supreme Court held that U.S. Customs officials may, consistent with the Fourth Amendment, board a vessel located in waters having ready access to the open sea for the purpose of examining the manifest and other vessel documents under 19 U.S.C. § 1581(a) (1976),[1] without any reasonable suspicion of prior wrongdoing.[2]

---

1. Footnote 2 to the opinion specifically states:

Section 1581(a) provides Customs officials with authority beyond boarding for document inspections. In this case, however, we are concerned only with the more narrow issue, United States v. Villamonte-Marquez, 462 U.S.at ____n.2, 103 S.Ct. at 2575 n.2.

(Footnote 2 on page A61)

We conclude that, for two reasons, Villamonte-Marquez is inapposite to the present case. First, the vessel involved was boarded while located on land atop a boat railer at the Crandon Park Marina in Miami. It was obviously not therefore in "waters offering ready access to the open sea," an essential requirement of the decision. See 462 U.S. at——, 103 S.Ct. at 2580, 77 L.Ed.2d at 31.

---

2. The court at the outset of its opinion states:

Congress has provided that "[a]ny officer of the customs may at any time go on board of any vessel...at any place in the United States...and examine the manifest and other documents and papers...and to this end may hail and stop such vessel... and use all necessary force to compel compliance." 19 U.S.C. § 1581(a) (1976). We are asked to decide whether the Fourth Amendment is offended when Customs officials, acting pursuant to this statute and without any suspicion of wrongdoing, board for inspection of documents a vessel that is located in waters providing ready access to the open sea. United States v. Villamonte-Marquez, 462 U.S. at____, 103 S.Ct. at 2575 (footnotes omitted). The Court's decision answers this question in the negative.

Second, and probably more important, the boarding and subsequent search of this land-situated vessel was in no sense undertaken as a document inspection. As the eleventh circuit has recently, and we think correctly, stated in United States v. Herrera, 711 F.2d 1546 (11th Cir. 1983):

> In United States v. Villamonte-Marquez, ___ U.S. ___, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), the Supreme Court held that no suspicion is necessary to stop and board a vessel that is located in waters providing ready access to the open sea to conduct a document inspection pursuant to 19 U.S.C. § 1581(a). The Court also made clear that Customs officers are not precluded from using document check authority simply because they suspect drug smuggling or other illegality on board, ___ U.S. at ___, n. 3, 103 S.Ct. at 2577 n. 3. However, nothing in that opinion suggests that reasonable suspicion is not required when the Customs officers' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection. [e.s.]

711 F.2d at 1554 n. 13. The emphasized observation plainly applies here. No one was even on the vessel at the time of the boarding; no effort was made by the Customs officer while aboard to inspect vessel documents or examine the manifest; and the entire search was for the admitted purpose of discovering whether marijuana was concealed on the vessel.[3]

(Footnote 3 on page A63)

Neither Villamonte-Marquez nor any other decision of the United States Supreme Court or the courts of Florida has ever authorized such a search without a prior showing of founded suspicion, one which the state concedes was not made in this case. See State v. Zafra, supra. Indeed, Villamonte-Marquez was careful to hold that the suspicionless stop of a vessel located in waters providing ready access to the open sea for a vessel document check, while constitutionally valid, did not thereafter authorize a general search of the vessel--as was conducted in this case--because the stop

> involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents. "Neither the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." (citations omitted)

462 U.S. at ___, 103 S.Ct. at 2581, 77 L.Ed.2d at 33.

For these reasons, we hold that our previous dicision is unaffected by Villamonte-Marquez. The order below is therefore again

Affirmed.

---

3. See also, United States v. Whitmire, 595 F.2d 1303 (5th Cir.1979), in which Customs officers boarded a docked vessel after checking its documents ashore; in Herrera, the court stated that

> [i]n these circumstances, neither border crossing authority nor section 1581(a) document and safety check authority was available to render the boarding search reasonable under the fourth amendment.

711 F.2d at 1553.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
CASE NO. 81-474

THE STATE OF FLORIDA, **
Appellant, **
vs. ** MOTION FOR REHEARING
SILVIO P. ZAFRA, **
Appellee. **

COMES NOW, the Appellant, THE STATE OF FLORIDA, by and through its undersigned counsel and submits this Motion for Rehearing, to wit:

1. That on January 24, 1984, this Honorable Court again affirmed the judgment of the trial court below dismissing the present criminal charges upon the Defendant's Motion to Suppress. This cause had been previously reversed in Florida v. Zafra, 462 U.S.___, 103 S.Ct.

3529, 77 L.Ed. 2d 1382 (1983). In so ruling, this Court held that United States v. Villamonte-Marquez, 462 U.S. ___, 103 S.Ct. 2573, 77 L.Ed. 2d 22 (1983), permitting customs officers to board any vessel under Section 19 U.S.C. Section 1581(a) without articulable suspicion, was inapplicable to the present circumstance. Citing this Court's original opinion in State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982), this Court stated that the State had "conceded" that there was no articulable suspicion in the present case.

2. This Court's analysis that the State "conceded" that there is no articulable suspicion herein is based solely upon the wording of this Court's opinion in State v. Zafra, 408 o.2d, supra. As reflected in the excerpt to the State's original brief on appeal in this matter,

it states:

> "Furthermore, the State would note that the officers did indeed have reasonable suspicion, based upon their experience with smugglers and their observations, to board the vessel."

Brief of State at p. 14.

The undersigned has litigated this matter throughout on behalf of the State and the undersigned never conceded anywhere that there was no articulable suspicion in the present case. This is particularly so since the undersigned was aware that Florida v. Royer, 460 U.S.___, 103 S.Ct. 1319, 75 L.Ed. 2d 229 (1983), was pending at the time this present matter was being litigated and prepared for presentation to the United States Supreme Court. This Court's reference to any "concession" by the State should thereby be deleted.

3. The State submits that this Court has totally overlooked the fact that the

officers observed the boat in "customs waters" and boarded the boat within seconds after it had been removed from "customs waters" as it sat on a boat trailer on the boat ramp leading to "customs waters". Therefore, this Court's analysis that the boat was not in "customs waters" at the time it was boarded is not controlling nor dispositive of the present issues.

4. This Court's central position that the customs officers intended to board the boat because they suspected that it was carrying narcotics rather than boarding the boat to check "customs papers" is not accurate. First of all, the undisputed evidence below from the testifying officers established that Officer Nasossis checked the boat's papers. See T.16; T.41. Secondly, the officers boarded the boat because they decided to conduct a routine

customs boarding. T.16. The evidence in this regard is undisputed. Furthermore, this Court's foregoing analysis as to the intent of the officers is not relevant. See State v. Valdes, 423 So.2d 944 (Fla. 1982). In Valdes, the officer indicated that he conducted an "inventory search". The Valdes court rejected the statement of the officer's intent as controlling because the officer had lawful authority to conduct the search on other grounds. In United States v. Villamonte-Marquez, supra, 103 S.Ct. at 2577, N.3, the United States Supreme Court specifically rejected this Court's analysis, holding that the officer's subjective intent to seize narcotics from the vessel in Villamonte-Marquez, was not relevant inasmuch as the officers had lawful authority to board the boat in any event.

5. Finally, the State submits that the Customs Officers plainly had authority to search the vessel for narcotics under the specific terms of 19 U.S.C. 1581(a) and 21 U.S.C. § 955. This Court's limitation of the authority of Custom's Officers is therefore unlawful and contrary to Congressional intent.

WHEREFORE, upon the foregoing, the Appellant, THE STATE OF FLORIDA, prays that this Honorable Court will vacate its prior opinion in this matter and grant rehearing and upon rehearing will reverse the trial court's judgment granting the present motion to suppress.

RESPECTFULLY SUBMITTED on ths 8th day of February 1984, at Miami, Dade County, Florida.

Respectfully submitted,

JIM SMITH
Attorney General

(signed) Calvin L. Fox
Assistant Attorney General

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM,A.D., 1984
WEDNESDAY, FEBRUARY 29, 1984

STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 81-474
SILVIO P. ZAFRA,	**	
Appellee.	**	

Upon consideration, appellant's motion for rehearing is hereby denied.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D., 1984
FRIDAY, MARCH 23, 1984

THE STATE OF FLORIDA **
Appellant, **
vs. ** CASE NO. 81-474
SILVIO P. ZAFRA, **
Appellee. **

The motion of appellant to stay the issuance of our mandate pending review by the Supreme Court of Florida of the order of judgment of this court entered herein on January 24, 1984 is granted pending entry of an order by the Supreme Court accepting or rejecting jurisdiction for review and for fifteen days thereafter; provided, however that this order so staying the mandate shall stand vacated without further order of this court in

the event proceedings to invoke such jurisdiction of the Supreme Court are not timely commenced, through failure of the movant to file notice thereof in this court as and within the time required by Fla.R.App.P. 9.120(b).

SUPREME COURT OF FLORIDA
THURSDAY, OCTOBER 18, 1984

STATE OF FLORIDA, :
CASE NO. 65,129
Petitioner, : District Court of Appeal 3d District
vs. : Case No. 81-474
SILVIO P. ZAFRA, :
Respondent. :

This cause having herefore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

ADKINS, ALDERMAN, OVERTON, MCDONALD, and EHRLICH, J.J., Concur.
BOYD, C.J. and SHAW, J., dissent.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D., 1984

TUESDAY, NOVEMBER 20, 1984

STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 81-474
SILVIO P. ZAFRA,	**	
Appellee	**	

Upon consideration, appellant's motion to stay the issuance of our mandate pending review of the Supreme Court of the United States is granted.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
APR 23 1985
ALEXANDER L. STEVAS
CLERK

ORIGINAL

NO. 84-953

IN THE

SUPREME COURT OF THE UNITED STATES

THE STATE OF FLORIDA,

Petitioner,

vs.

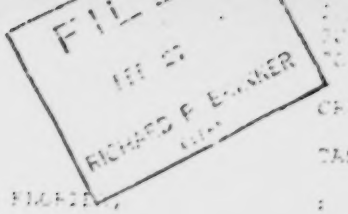
SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

RESPONDENT'S APPENDIX

86PP



IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE No. 80-[illegible] (16)

STATE OF FLORIDA,

Plaintiff,

vs.

[illegible],

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE

THIS CAUSE having come on for a hearing before the Court upon the Defendant's Motion To Suppress Evidence Obtained Through An Unreasonable Search And Seizure Pursuant To Rule [illegible] Of The Florida Rules Of Criminal Procedure, and this Court having received and considered all testimony, evidence, and exhibits introduced into evidence by the prosecution and by the defense, and this Court having heard and considered argument of counsel for the prosecution and counsel for the defense, and this Court being fully advised in the premises for the aforementioned matter, this Court does make the following findings of facts and conclusions of law:

1. That the search and seizures complained of in the instant case do not qualify as "border searches" under either Florida or Federal law. This point was conceded by the State at the outset of the evidentiary hearing and again during closing argument.

2. That, predicated upon the facts of the instant case, the searches and seizures in question cannot be categorized or qualify as permissible law enforcement activities pursuant to 19 U.S.C. §1581. Thus, the prosecution cannot rely upon the provision of 19 U.S.C. §1581 to validate the search and seizure in question in the instant case.

3. That, considering the totality of the testimony, exhibits, and circumstances pertaining to the search and seizure in question, this Court does specifically find that the "stop" of the Defendant, and the subsequent search and seizures were predicated upon "reasonable" or "founded" suspicion that criminal

Customs violation had occurred or that any criminal activity was afoot involving the Defendant, his companion, or the vessel in question.

4. That, Earnest v. State, 293 S.O. 2d 111 (3rd D.C.A. 1974), is controlling and mandates the suppression of the evidence in the instant case.

5. That the search and seizures complained of in the instant case violate the search and seizure clauses of the Fourth Amendment to the United States Constitution and Article 1, Section 12, of the Florida Constitution.

6. That even assuming arguendo, that the search and seizures performed by officers of the United States Custom Service were predicated upon "reasonable" or "founded" suspicion, that the subsequent seizure of the evidence by officers of the Dade County Public Safety Department, without having applied for or obtained a search warrant, constitutes a further 'unreasonable search and seizure" and therefore, violates Article 1, Section 12 of the Florida Constitution. Predicated upon the totality of the facts and circumstances pertaining to the seizure of the evidence in the instant case by members of the Dade County Public Safety Department, this Court does specifically find that said Dade County Public Safety Department officers should have applied for and obtained a search warrant prior to the seizure of the evidence in the instant case.

Therefore, It Is Ordered and Adjudged that the Defendant's motion to suppress evidence, entertained by this Court on February 20th, 1981, is granted in its entirety and this Court does suppress the evidence described in the aforementioned motion.

Done and Ordered this the 27th day of February, 1981, nunc pro tunc effective February 20th, 1981, in open Court in Miami, Dade County, Florida.

STATE OF FLORIDA)
COUNTY OF DADE) S.S.

I HEREBY CERTIFY that the instrument is a true copy as shown by the records of said Court.
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court this
MAR 11 1981
Clerk Circuit and County Courts

CIRCUIT & COUNTY COURTS

Circuit Judge, 11th Judicial Circuit
County Judge, Dade County, Florida

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 80-19386

STATE OF FLORIDA, :

Plaintiff, :

-vs- :

SILVIO ZAFRA, :

Defendant. :

:

Office of Public Defender
8th Floor Justice Building
1351 N. W. 12th Street
Miami, Florida
Friday, January 30, 1981
3:35 o'clock p.m.

DEPOSITION OF RICHARD OGDEN

Taken by Ralph Francis, Notary Public in and for the State of Florida at Large, at the time and place set forth above, pursuant to Notice filed herein.

- - - - - -

3

APPEARANCES:

No appearance on behalf of the
State of Florida.

ROSEN, PORTELA, BRONIS, ANGUEIRA & CLAY, P.A.
By: WILLIAM A. CLAY, ESQ.
1395 Coral Way
Miami, Florida
On behalf of the Defendant.

- - - - - -

I N D E X

Witness	Direct	Cross
Richard Ogden	3	--

- - - - - -

Thereupon

RICHARD OGDEN

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAY:

Q Would you state your name and occupation for the record.

A Richard Ogden. I am a Patrol Officer for the United States Customs Service.

Q How long have you been so employed?

A Approximately eighteen months.

Q Prior to that, how were you employed?

A Prior to that I worked as a temporary employee with the United States Customs Office of Investigations.

Q What kind of activities did you do in that position?

A In that position, primarily background investigation on persons or corporations applying for a Customs bonded license, and I also conducted investigations concerning minor navigation violations which violate a certain Code of Federal Regulations.

Q Prior to that job as a temporary employee, how were you employed?

A Prior to that, I was a part-time employee with a retail grocery chain.

Q Did you have any previous experience with law enforcement?

A No, sir.

Q Calling your attention to the case of the State of Florida versus Silvio Zafra, which is a prosecution for Unlawful Possession of Marijuana, and Importation of a Controlled Substance into the State of Florida, I am going to ask you some questions about that particular case.

I assume you had some involvement in it?

A Yes, sir.

Q In the interest of saving time, I am just going to advise you that I have taken the deposition of Customs Patrol Officer Nesossis, and, unless you have any objection, what I propose to do is summarize what Officer Nesossis has advised me and ask you if that is correct.

A Okay.

Q If you feel that in order to accurately explain what you did or what the other officers did, you need to expand on an answer beyond a yes or no, or if you feel I am inaccurate or incorrect in any way, go ahead and interrupt me and set the record straight,

Okay?

A Yes.

Q It is my understanding that on the day in question, you and Customs Patrol Officers Carlin and Nesossis were located in a van, conducting certain surveillance at the boat ramp area at the Key Biscayne Marina?

A Crandon Park Marina, that is correct.

Q It is also my understanding that this surveillance was being conducted by the three of you in the early morning hours?

A That is correct.

Q It is also my understanding that as a part and parcel of your surveillance activity, the three of you officers have been observing various vessels that approached the boat ramp and pier area.

A I don't really recall if a number of vessels, as you put it, came in prior to the suspect vessel, I really can't say for sure.

Q Okay. It is also my understanding that as part of your activities you were randomly stopping and boarding certain vessels for violations of the law?

A That is correct.

Q Essentially, this was in the nature of exploring for violations of Federal and State law?

A That is correct.

Q It is my understanding that you, Officer Carlin, and Officer Nesossis were observing a twenty-five foot Bertram cabin cruiser that had approached the pier near the ramp and observed a Public Safety Department officer in uniform approach that boat as it was positioned near the pier?

A That is correct.

Q At that point the three of you officers exited the van and began to approach the scene?

A We did that as the officer was leaving, more or less walking away from the boat.

Q Do you now know the Public Safety Officer to be Officer Butchko?

A Yes, sir. I have come across him a time or two since that.

Q Was Officer Butckho leaving the scene?

A He was walking away from the vessel. He was walking off the dock towards his vehicle when we decided we would go ahead and check the boat out further.

Q Was he alone or did he have any subject in his custody?

A He was alone.

Q Based on your discussions with Officer

Butchko, was he about to leave the scene, conclude his police activity and move on?

A To the best of my recollection, I believe he just walked up to the boat, shined his light into it briefly, and walked away, and as far as I can remember, he felt--he indicated that there was something wrong but he couldn't see what it was or find it. So he intended to leave.

Q In other words, he had made the mental decision to terminate his investigation and go on about his patrol?

A That is correct.

Q It is also my understanding that as the boat was being trailered, that is, put onto the trailer that was connected to a truck that had been backed down the boat ramp, the three of you officers approached Mr. Tafra and Mr. Sanchez and advised them that you were Customs Patrol Officers?

A That is correct.

Q By the way, were you officers in uniform or plainclothes?

A Plainclothes. We were wearing what we call raid jackets.

Q Which have an insignia?

A They have an insignia on the jacket, a

Customs patch on each side and in large yellow letters it says, "U. S. Customs" on the back.

Q It is my understanding that the three of you identified yourselves to Mr. Zafra and Mr. Sanchez as being United States Customs Officers---

A That is correct.

Q (Continuing) --and advised them that you were interested in boarding the vessel---

A That is correct.

Q (Continuing) --and that they were detained while a boarding of the vessel took place?

A That is correct.

Q It is my understanding that your primary activity at this point was to physically climb aboard the vessel and conduct a search---

A That is correct.

Q (Continuing) --whereas, Officers Carlin and Nesossis were primarily involved in detaining the two subjects and talking to them?

A That is correct.

Q While the vessel was on the trailer, isn't it true that you had to physically climb aboard it in order to see the deck area?

A That is correct.

Q Once you climbed aboard the vessel you

began a search of the vessel?

A That is correct, beginning with a visual examination.

Q When you say visual examination, what did you do?

A Basically, before I climbed on the boat I stood on the fender of the boat trailer and looked up over the edge of the boat into the boat and just did a quick visual scan of the deck and things on it.

The number one priority here is to make sure there is no other persons hidden on board or---

Q For your own safety?

What was the result of that particular aspect of your visual observation?

A I observed no other persons on the vessel, as far as I could see.

Q Did you observe anything that caused you any concern for your own safety or that of the other officers?

A No, sir. I did not. The first thing that caught my attention upon looking at the boat was the difference between the height of the deck and the bottom of the vessel. It was quite obvious that the height of the deck gave the appearance that a very large space existed under the deck.

A That is correct, nothing visible.

Q As a result of running your hand over the carpet, what did you perceive, or find out?

A When I ran my hands over the carpet I felt a very distinct rise or incongruency, I should say, in the deck. I could run my hand around the carpet and feel what appeared to be a seam, to me. There was a definite crack--the hatch or whatever it was at the time or what I thought it was at the time was not level with the rest of the deck. I felt that this probably could have been a hatch, and later proceeded to open it up.

Q Did you have to pull up the carpet in order to get to the hatch?

A That is correct. The carpet had to be completely pulled up off the deck.

Q Was the carpet fastened down by any means of adhesive, staples, nails, or anything?

A I believe a little bit of adhesive, drop spots here and there. It was not glued on really tight.

Q Now, at the point in time when you pulled up the carpet which was fastened to the deck by way of some adhesive material, did you know or have any idea whatsoever what might have been below the deck?

A With prior experience of myself and other officers, I suspected there was a good chance the vessel might have contained contraband.

Q Can you articulate any specific fact other than your experience, any specific fact about this boat at that point in time which caused you some suspicion that there might have been contraband below the deck?

A A couple of things. I noticed there were a lot of items on board the vessel which could have been indicative of a long trip, extra food, much more than the average person would take on a three or four-hour fishing trip.

Q Both individuals seemed to be acting a little nervous once they got the boat out of the water and we approached and identified ourselves.

I personally did not have any conversations with the suspects at any time, but just their reactions to routine questions by the other officers and things, something was definitely amiss.

When we pulled the carpet back and saw there was a hatch, Officer Kesoosis put his nose close to the seam and reported that he smelled what he thought may have been marijuana at the time.

Q Did Officer Kesoosis report this smell to

you before the hatch was opened?

A Right.

Q What happened next? Did you open the hatch?

A That is correct, he and I together obtained a few tools from our tool bag we usually carry with us and removed a number of screws--I don't remember how many--a dozen or more. It was a fairly large hatch--and removed the hatch and the marijuana was visible, right there.

Q Had you, Officer Carlin, Officer Nesossis, or Officer Butchko received any tip or intelligence information pertaining to that boat in advance of intercepting and stopping Mr. Zafra and Mr. Sanchez?

A No, sir.

Q So, essentially, this stopping of Mr. Zafra and Mr. Sanchez was all part and parcel of your random stopping of people in boats?

A That is correct.

Q Did you or Officer Carlin, Officer Nesossis, or Officer Butchko have any information or evidence to suggest that that particular twenty-five foot Bertram had been outside of the United States?

A No, sir.

Q Did you have any information or evidence to

Q You eventually did learn the identities of the two people arrested as being Mr. Sanchez and Mr. Zafra?

A Correct.

Q Looking back and focusing on your observations of the two men who got off the Bertram, can you now say that you can positively identify those two men as being the Silvio Zafra and the Sanchez that were arrested?

A Yes, sir. I believe I can.

Q Was there anything unusual about the twenty-five foot Bertram or the two men, Mr. Zafra and Mr. Sanchez, that you observed prior to their being stopped, detained, and the boat boarded?

A Not particularly, no.

Q Again, the only reason that that particular boat and those two subjects were singled out is the fact that you were going to randomly stop them?

A That is correct.

Q I understand that none of this police activity was done with a search warrant?

A That is correct.

Q Did you, Officer Carlin, Officer Nesossis, or Officer Butchko have any information or evidence to suggest that the twenty-five foot Bertram and Mr.

Carlin and Officer Nescssis said to Mr. Zafra and Mr. Sanchez other than identifying themselves as Customs Patrol Officers and advising they were going to be detained while a boarding and search was conducted?

A No, sir. I had no conversation. My proximity was in the vessel the entire time of the search.

Q When the three of you Customs Patrol Officers approached these two men, Mr. Zafra and Mr. Sanchez, it is my understanding you identified yourselves, all three of you, and told them that it was your intention to board the boat and search it?

A That is correct.

Q And you advised them they would be detained while the boarding and search took place?

A That is correct.

Q And you requested them to produce registration or documents for the boat?

A I did not. I believe one of the other officers did.

Q Neither Mr. Zafra or Mr. Sanchez were free to go or leave at that point?

A No, sir. They were not.

Q They were advised that they were detained

while this was going on?

A I don't think it was specifically defined that they couldn't leave, but we had no intention of letting them leave.

Q It was also pretty apparent to them that they were restrained until your activities were over?

A Yes, sir.

Q As I understand it, they were nor formally advised that they were arrested until after you discovered bales of marijuana below deck?

A That is correct.

Q It is also my understanding that no one advised them of their Constitutional Rights to remain silent, their privilege against self-incrimination and their right to have an attorney present until after they were formally arrested?

A Yes, sir. I believe that is correct.

Q Is there anything else you can remember about this case?

A No, sir. It happened quite a while ago, and I have been involved in a dozen or more since then.

Q Do you have any evidence or information to suggest Silvio Zafra, Mr. Sanchez, or the twenty-five foot Bertram had been involved in importing or

bringing marijuana into the State of Florida from a place outside of the State of Florida as opposed to merely transporting marijuana within the State?

A No, sir. I have no information regarding that.

Q It is my understanding that no marijuana was found in the physical possession of Mr. Zafra and Mr. Sanchez, that is to say, in their hands or on their person?

A Not to the best of my recollection, I don't believe so.

MR. CLAY: I have no further questions.

You have a right to read and sign this deposition when it is typed up, if you want to. It is totally your choice.

THE WITNESS: I will waive that right. I will get to see it, anyway.

(Thereupon the taking of the deposition was concluded at 3:55 o'clock p.m.).

(Thereupon reading, signing, and notice of filing were waived).

CERTIFICATE OF NOTARY

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, RALPH FRANCIS, Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of RICHARD OGDEN at the time and place hereinabove set forth; that the witness was first duly sworn by me; and that the foregoing pages numbered from 1 to 20, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS MY HAND AND SEAL at Miami, Dade County, Florida, this _____ day of February, 1981.

_____
Notary Public

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 80-19386

STATE OF FLORIDA,

Plaintiff,

-vs-

SILVIO ZAFRA,

Defendant.

Office of Public Defender
8th Floor Justice Building
1351 N. W. 12th Street
Miami, Florida
Friday, January 30, 1981
2:40 o'clock p.m.

DEPOSITION OF RICHARD M. NESOSSIS

Taken before Ralph Francis, Notary Public in and for the State of Florida at Large, at the time and place set forth above, pursuant to Notice filed herein.

- - -

APPEARANCES:

No appearance on behalf of the
State of Florida.

ROSEN, PORTELA, BRONIS, ANGUEIRA & CLAY, P.A.
By: WILLIAM A. CLAY, ESQ.
1395 Coral Way
Miami, Florida
On behalf of the Defendant.

- - - - -

I N D E X

Witness	Direct	Cross
Richard M. Nesossis	3	--

- - - - -

Thereupon

RICHARD M. MESOSSIS

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAY:

Q Would you state your name and occupation for the record?

A Richard M. Mesossis. I am a Customs Inspector at Miami International Airport.

Q How long have you been so employed at Customs?

A I have been with Customs for approximately fourteen months.

Q How long have you been assigned at the airport?

A I have been an inspector for a month and a half.

Q Prior to that, what was your assignment?

A I was a Customs Patrol Officer assigned to the Customs House on the Miami River.

Q You say you have been with Customs for fourteen months?

A Yes.

Q Prior to that, where were you?

A I was a police sergeant with the Panama Canal

Zone Police Department, Panama.

Q How long were you employed by the Canal Zone as a police officer?

A Seven years.

Q Calling your attention to the case of State of Florida versus Sylvio Zafra, did you have occasion to be involved in that particular case?

A Yes. I did.

Q On what date and at what time did you first have any involvement in the case?

A It was on October 19, 1980, at approximately 3:45 a.m. on that morning.

Q What was your first involvement or knowledge regarding this case?

A Myself and two other CPO's were on surveillance at the Crandon Park boat ramp on Key Biscayne, surveillance of the boat ramp.

Q Who was with you?

A CPO James Carlin and CPO Richard Ogden.

Q Where were you located in your surveillance at that point in time when you first had some involvement in this case?

A We were in a van parked at the boat ramp.

Q Was this a standard-type surveillance van with windows that you could see out of but which could

not 1. scen into?

A We have two vans. I believe we were in a CBA van which is like blue with regular windows. I'm not sure which van we were in that night.

Q Was the van stationary?

A Yes, sir, it was.

Q Where was the van located in relation to the boat that was eventually seized?

A The van was parked in one of the areas that is marked for parking vehicles with trailers. It is not directly in front of the boat ramp.

As you are facing the boat ramp, it would be to the right, approximately one hundred and fifty feet.

Q Did you or the other Customs Patrol Officers, Officers Ogden and Carlin, have any tip or information that a particular boat would be coming in laden with contraband?

A No, sir.

Q So this was just routine surveillance that night or might not yield an observation of some criminal conduct?

A Yes, sir, that is correct.

Q Had you had any contact with Public Safety Department officers relative to your surveillance?

A No, sir, not at that time.

Q What is the first observation you or the other officers, Officers Carlin or Ogden, made regarding this case?

A We were in the vehicle watching the boat ramp and at approximately 03:45 hours a twenty-five foot white Bertram came up the channel and docked at the pier, at one of the piers at the boat ramp--there is two finger piers.

Q Which pier did the Bertram dock at?

A It is the first pier which is closest, at that time was, closest to the office, the Marina office.

Q Where would that pier be in relation to your vantage point in the surveillance van?

Would that be the closest pier to you?

A It would be the closest pier to us, yes, sir.

Q You said that would be one hundred and fifty feet away from you?

A Approximately one hundred and fifty feet.

Q What time did you say this was, 3:45 a.m.?

A 3:45 a.m., yes, sir.

Q Were you, Ogden, and Carlin using any kind of devices to enhance your ability to see, such as

binoculars or night scopes or anything?

A We were using binoculars. We were not using night scopes.

Q How many sets of binoculars did you have?

A One pair. Officer Carlin carries a pair with him.

Q What was the first observation that any of the three of you Customs Patrol Officers made with regard to this case?

A Well, the boat came in and docked, and one of the individuals left the boat and went to a truck that was connected to a trailer parked directly in front of the boat ramp and backed the truck and trailer down into the water to put the boat on.

Q Do you now know which individual left the Bertram and went to the truck and backed the truck up?

A Yes, sir, that was Defendant Zafra.

Q What else did you observe?

A Before the men got the boat out of the water, a PSD Patrol vehicle pulled up and stopped in front of the truck at the boat ramp.

Q This was a marked police unit?

A Yes, sir, green and white, PSD.

Q Let me go back a little bit in the sequence

of events.

When the person you now recognize to be the Defendant, Sylvio Zafra, left the boat and went and got the truck--did the truck have a trailer on it, first of all?

A Yes, sir.

Q Did he back the trailer and the truck down the boat ramp?

A Yes, sir.

Q Did he back the trailer into the water?

A Yes, sir. The trailer was in the water and he stopped the truck and got out of the truck.

Q At that point what was being done with the Bertram?

A It was tied up to the dock. The other individual was with the boat on the dock. It was just floating in the water, sitting there.

Q Do you now know who the other person was who stayed with the boat while Mr. Zafra went to get the truck?

A That was Defendant Sanchez.

Q Where was the boat in relation to the truck and trailer when the Public Safety Department unit pulled up?

A The truck and trailer were directly in front

of the boat as if they were going to load it.

Q So the truck and the trailer would have been running parallel to the pier?

A Yes, sir.

Q Had the boat been pulled up to the trailer to begin the loading process?

A No, sir.

Q Was there any coordination between you, Officer Carlin, Officer Ogden, and the Public Safety personnel that pulled up?

A No, sir.

Q That was not arranged between the two agencies?

A No, sir.

Q What did you observe take place after you observed the Public Safety Department unit approach the area you have just mentioned?

A The officer got out of the car and went down onto the pier, and he appeared to be conversing with the two individuals. He shined his flashlight, looked over into the boat, and then walked down to the end of the pier and walked back to the truck with both individuals.

Q Do you know Officer Butchko?

A Yes, sir.

Q Was Officer Butchko alon

A Yes, sir.

Q Were there any other officers or people in the Public Safety Department vehicle he was driving?

A No, sir.

Q When Officer Butchko walked down the pier and approached the Bertram, did he go aboard the Bertram?

A No, sir.

Q Is that when you saw him use a flashlight?

A Yes, sir.

Q Where was the Defendant, Sylvio Zafra, when Officer Butchko went down to the boat and flashed a light on it?

A I believe he was standing by the pick-up truck and the other individual was out on the pier by the boat.

Q In terms of walking distance from the truck to the boat, can you give me an estimate of what that distance would be?

A Approximately thirty feet, twenty feet, twenty-five feet.

Q How long did Officer Butchko stay in the vicinity of the boat at the pier?

A As soon as he walked back down the pier with both individuals, we approached their location and got out of our vehicle.

Q But how long did Officer Butchko stay around the boat making observations?

A Possibly thirty seconds, just briefly, very briefly.

Q Could you see where Officer Butchko's light focused on the boat?

A No, sir. We could just tell he did shine it down inside, that was it.

Q Can you tell me where he was standing in relation to the bow and stern of the boat?

A He was standing approximately, maybe, six feet from the stern, right even with the gunnel, not quite halfway. He was in the forward--the rear portion, about six feet from the stern.

Q Was it high tide, low tide, or ebb tide at that time, do you know?

A I'm not sure.

Q Do you recall whether or not Officer Butchko stooped down or scrooched down in order to make his observations?

A No, sir. I don't believe so. He just stood up and leaned out over the boat and shined his

flashlight, and that was it, and we.ked back.

Q After Officer Butchko shone the flashlight, is that when you walked down the pier towards the truck in the company of Mr. Sanchez?

A Yes, sir.

Q What happened from that point on?

A Okay, at that time we decided to approach the three individuals and let Officer Butchko know we were there. We did. We identified ourselves at that time, and more or less, took over the boarding.

We advised Mr. Zafra and Mr. Sanchez that we were Customs Patrol Officers and that we were going to board his vessel.

We wanted to see his papers. At that time they loaded the boat on the trailer and pulled the boat out of the water.

Q Who did the talking for you Customs Officers, was there a lead officer?

A Myself and Officer Carlin were the two officers that talked to Mr. Zafra and Mr. Sanchez.

Q Do you speak Spanish?

A I don't speak fluent Spanish, but I do speak some Spanish; Officer Carlin does speak Spanish.

Q What you said to Mr. Zafra and Mr. Sanchez, was it in English or Spanish?

A I believe I spoke to him in English.

Q Did Officer Carlin speak Spanish to both men?

A Yes, sir. He did.

Q Do you know what Officer Carlin said to the men in Spanish?

A Not exactly, but I believe he told them that we were United States Customs Inspectors and that we did want to look at his boat registration papers, and advised him that we were going to board the vessel.

Q Now, I am a little unclear as to how the loading of the boat took place in light of the fact that you officers from Customs had advised Mr. Sanchez and Mr. Zafra that you wanted to see the documents for the boat, and that you were going to board it.

Were they requested to pull the boat out of the water onto the trailer, or did they go ahead and load the boat on the trailer before you told them you wanted to board the boat?

A I'm not sure if we requested them or not. Everything happened in, more or less of a sequence, and when we got there we advised them we were going to board the boat, and at the same time, they loaded it on.

One of us may have requested them to put in on the trailer. I really don't know if we did or not.

Q Were they in the process of loading the boat when they were approached?

A Yes, sir. They were going to put the boat on the trailer, yes, sir.

Q It was just a matter of a moment or two one way or the other?

A Yes, sir.

Q Now, were Mr. Zafra and Mr. Sanchez free to go, or were they being detained from the moment when you and the other two Customs Officers identified yourselves and presented authorization?

A Yes, sir. They were being detained.

Q What else was said by all parties to this activity?

A We normally ask the standard questions, such as where have you been, how long have you been gone, are there any other parties, do you have any foreigners on board, where are your papers, and who is the owner of the boat, and things like that.

Q Who asked those questions?

A I asked some of them, and Officer Carlin asked some of them.

Q What you asked you asked in English?

A Some of them I may have asked in Spanish, like if they were fishing, simple questions.

Q Did Officer Carlin speak exclusively in Spanish to these individuals?

A Yes, sir. I'm pretty sure he spoke Spanish.

Q Do you recall if Mr. Zafra or Mr. Sanchez answered any of these questions?

A Yes, sir. They did.

Q What did Mr. Zafra say and what did Mr. Sanchez say?

A Mr. Sanchez made a few comments; Mr. Zafra said he had been out fishing in the Key Largo area and that they had gone out earlier that evening and they had gone strictly for fishing, and the boat was not his. It was a friend's boat and he had borrowed it.

Q What else was asked of the two men, and what else did they say?

A At that time that was more or less it. While myself and Officer Carlin were on the ground, Officer Ogden had already entered the boat and was going to perform a Customs search.

Q In other words, while you and Officer Carlin were identifying yourselves to Mr. Zafra and

Mr. Sanchez, and while you were detaining them and asking them the questions that you have just mentioned, Officer Ogden went directly to the boat and boarded it?

A Right, yes, sir.

Q How did Officer Ogden board the boat?

A Well, it was on the trailer. He crawled up over the stern of the boat.

Q Was the stern portion of the boat in the water?

A No, sir. The boat was completely out.

Q Had the truck been driven forward in order to clear the water?

A He had moved it forward, yes, sir.

Q Were Mr. Sanchez and Mr. Zafra in the truck in the process of driving away when the three of you Customs Officers approached them?

A No, sir.

Q I am not quite picturing this clearly.

Did they pull forward and then stop, and as they were about to do something, that is when you came forward?

A No, sir. We came forward while Officer Butchko and the two individuals were standing by the truck, and, at the time we approached them and talked

to Officer Butchko and told him who we were, and at the same time Mr. Sanchez and Mr. Zafra pulled the boat out of the water, put it on the trailer, and pulled the truck forward at, more or less, the same time.

Q Did either you or Officer Carlin advise Mr. Zafra and Mr. Sanchez that they were being detained, that they couldn't go anywhere until you finished the questioning that you were engaged in and the boarding of the boat that you wanted to do?

A We may not have come right out and told them that they were being detained and that they couldn't go anywhere, but we did tell them that we were Customs and we were going to perform a search, and they cooperated. There was no--they didn't ask any questions like why or can't we go or anything else. They were very cooperative.

Q Based on what you said and what Officer Carlin said to them, they were certainly given the impression that they were not free to go?

A Oh, sure, right.

Q Where was Officer Butchko while all this was going on?

A He was standing with myself and Officer Carlin.

Q Was he doing any talking?

A No, sir.

Q At this point were you Customs Officers the primary officers involved in the investigation?

A Yes, sir.

Q Prior to the Public Safety Department, Officer Butchko, coming to the boat as it was tied up to the pier, had you Customs Officers made a decision what you were going to do regarding that boat?

A Yes, sir.

Q What decision had you made?

A We had decided, as soon as the two individuals had taken the boat out of the water, that we would approach them and perform a routine boarding.

Q During this duty shift that you were engaged in out there at Crandon Marina, had you been randomly approaching boats and boarding them and searching them?

A Yes, sir.

I couldn't say how many we did board that particular night, but that was our intentions, and I don't remember if we had boarded any or not. I'm pretty sure we had.

Q Basically, what you were doing was surveilling the area and exploring whether or not any boat had contraband in violation of United States or State law?

A Yes, right. We have, more or less, a profile we look for. Those boats that come in and meet certain ID and characteristics, we do board.

Q What did you observe Officer to do after he crawled aboard the boat?

A Okay, from the time Officer Ogden crawled on the boat, I didn't observe him until he called and advised me would I come aboard. He wanted to show me something, at which time I did get into the boat.

Q What was the first thing Officer Ogden did in the course of his inspection of the boat, to crawl aboard it?

In other words, he didn't go looking around the exterior of the boat first. The first thing he did was crawl aboard?

A I went around the outside, myself. I did that.

The first thing he did was crawl aboard. He was there several minutes, and then he called me.

Q Did you walk around the boat inspecting the

exterior of the boat before office. Order boarded it?

A No, sir. He was already on board. After I stood with Carlin for several minutes, I checked the exterior, walked around.

Q Can you describe this boat, particularly as far as length, beam, construction, and lay-out?

A It is a twenty-five foot Bertram, fiberglass. It was white, I believe, with blue trim. It is a cabin cruiser-type, it is an older boat that does have a forward cabin that you go down into that has bunks in it.

Q That would be a V-berth type cabin?

A Right, yes.

Q What about what you were---

A Its cabin top is a hard top, not a canvas-type top like a Bimini top. It is a molded fiberglass, solid piece.

Q Is there a walk-in cabin which is on the same level as the aft deck?

A No, sir. You have to walk down into the cabin. It is a Cutty-type cabin.

Q What is located on the boat at the point where you had been walking down to the forward cabin?

A Okay, on the right is the helm, the steering

wheel, and then on the left there is a chair, I believe, and an ice chest.

There were some other boxes. I believe there were other boxes, ice chests, to the left, which are built in behind one of the seats, but I'm not sure which it was, and the whole deck was carpeted with this green outdoor-type carpet, artificial grass.

Q This was on the aft deck?

A Yes, sir.

Q Now, the area where the helm is located, is this under the hard top that you have described?

A Yes, sir.

Q Was the companion way door or the doorway to the forward cabin closed at the time Officer Ogden went aboard?

A I'm not sure.

When I got aboard, there was no door there. I don't remember if there even was a door. There was not a door when I got aboard, it was not closed, if there was one.

Q When Officer Ogden called you, what did he say to you?

A Okay, he informed me that he had found what he suspected to be marijuana, suspect marijuana

residue all over the carpet inside the carpet, there, and that he thought that there was a hatch cover of some type underneath the carpet, directly before you approach the stairs, going down into the cabin.

He was asking my opinion, more or less, what I thought there was.

Q Did you then go aboard?

A Yes, sir. I did.

Q Did you observe any residue?

A Yes, sir. I did. There was a lot of seaweed, what appeared to be seaweed, and mixed in with that were marijuana seeds and particles of stems and what-not scattered all over the deck, plus there was a strong residue of lysol-type soap, such as Mr. Clean, and the carpet was soaked in it.

Q Can you give me a specific location where you observed the residue on the carpet?

A It was from in front of the engine cover, all the way to where you go down the stairs. It was in an area approximately five by five. It was everywhere. It was scattered all over the carpet.

Q There was also seaweed?

A Yes, sir. There were particles of this common seaweed you find washed up on the beach, mixed in with it.

Q In order to observe this residue and determine enough characteristics of it to form an opinion that it was marijuana, it was necessary to pretty much get down on all fours and look closely?

A Yes, sir. I did get down on one knee and pick quite a bit of it up, and that is when I discovered the lysol or whatever, because it soaked right through my pants and it was a bright yellow color.

Q Do I have an accurate mental picture here that the seaweed and the lysol was, kind of, camaflouging the residue to an extent so that it was necessary to get right down and perform a very close visual inspection?

A Correct. My opinion was that the lysol soap and past experience, it is used to cover up any smell that you would have if you had any marijuana contraband on board, and the seaweed would not be too uncommon for someone who had gone out fishing, possibly, but there was a more than normal amount on the deck, plus, when we did find the suspect marijuana residue, it was not unusual in that fact.

Q Officer Ogden asked you your opinion as to whether or not there might be some kind of a hiding place?

A Yes, sir. He had felt what he thought to be a hatch cover underneath the carpet, which he showed me, and I did agree with him that there was a hatch cover under there of some type.

Q While you and Officer Ogden were having this discussion and doing the inspection and search you have just described, what was Officer Carlin doing?

A We have a standard boarding form which we do fill out when we board a boat that has information on it of the Master of the vessel, the crew people on it, a description of the boat, registration information, where the boat is coming from, any unusual circumstances, which Officer Carlin--we carry a clip board with those forms--and at that time he was filling out the form.

Q Who was he getting the information from in order to fill out the boarding form?

A As far as I know, he was getting it from Mr. Zafra.

Q Did you overhear information being given to Officer Carlin by Mr. Zafra?

A Not at that time. I was on the boat.

Q It is more or less your assumption that that is what he was doing?

A When I left him, that is what he was going to

do.

Q What else did you, Officer Ogden, and Officer Carlin do?

A Okay, myself and Officer Ogden proceeded to pull the carpet that was covering that hatch, which we did, and the hatch was being held in place by approximately ten stainless steel screws, which I went to our truck--we carry a small bag that we carry test kits and tools in--I went to the van and got the bag that I carry, went back on board and took the screws out of the panel.

Q By the way, while the boat was on the trailer, were the gunnels of the boat over the height of the eyes of all of you?

A Yes, sir.

Q In other words, when the boat was on the trailer, in order to see into it and see the deck, it was necessary to physically climb aboard?

A You'd have to stand up on the trailer and hang on to the gunnel to look in. I had to do that one time.

Q Did there come a time when you, with the aid of tools, got the hatch out?

A We used the screw driver and took the screws out to get the hatch off.

Q What did you discover?

A Twelve bales of suspect marijuana. At that time we ran a field test, which proved positive.

Q Were they packaged in any fashion?

A Burlap and plastic.

Q Was the burlap and plastic intact, or were there any bales broken open?

A No, sir. I believe they were all intact.

Q What happened next?

A At that time I got off the boat and I advised Carlin that the boat--that we did discover the twelve bales.

At that time the two individuals were placed under arrest.

Q Okay. How were they placed under arrest, and by whom?

A Okay, we advised that we did find the marijuana on board and they were under arrest for the importation of marijuana.

I put the handcuffs on Zafra, I believe, and Carlin put the handcuffs on Mr. Sanchez.

Q Up until this point in time were Mr. Zafra and Mr. Sanchez advised of anything else?

Had they been told their rights to remain silent, have an attorney present, and so forth?

A Not up until that time, no, sir. Not unless Officer Carlin did it, and I don't believe he did it.

Q When they were advised they were under arrest for the importation of marijuana, did anyone advise them of their Constitutional Rights?

A Yes, sir. I read them in English and Officer Carlin read them in Spanish.

Q Were they given any forms or papers to sign to indicate that they understood those rights?

A Not at that time, no, sir.

Q Did Mr. Zafra or Mr. Sanchez say anything after being advised of their rights or during being advised of their rights?

A Not at that time, no, sir.

Q Did they say anything or did they merely listen to the rights?

A At that time they listened to them and they stated that they understood them.

Q Where was Officer Butchko when the formal advisement of arrest and Constitutional Rights took place?

A He was standing right there, right next to them.

Q What happened next after the formal arrest and advisement of Rights?

A Okay, we took the trailer and the truck, the boat and two prisoners back to the Miami Custors House on the river, on 5th Street, to fill out our paper work and to contact our supervisor and DEA concerning the case.

Q What took place on the ride back to the Customs House, anything of significance to the investigation?

A No, sir.

Q Was there any conversation with the defendants?

A No, sir. I drove the--another officer came and drove the truck and pulled the boat back, and Officer Ogden rode with him in the truck.

Myself and Officer Carlin drove the van back with the two prisoners, and there was no conversation that I can remember on the way back.

We wait until we get back to our office and get our paper work before we do anything else.

Q What about Officer Butchko, did he remain with you?

A No, sir, he did not. He, at that time, went about his business. We left him at the boat ramp and--he was assigned to that Key Biscayne Patrol.

Q What happened when you all arrived at the

Customs House?

A Officer Ogden stayed downstairs with the boat and the trailer, and the truck, and myself and Officer Carlin went upstairs, separated the two prisoners, and we proceeded to fill out our arrest or 151 reports, and other paper work.

We contacted DEA, who declined to prosecute on the case.

Q Who did you contact?

A I don't know the DEA officer's name that we called. I don't have the paper work on that.

Q Who conducted that discussion with the DEA personnel?

A I believe Officer Chuck Lampard did. I'm not positive. He was another officer working that night. He is a boat captain.

If he did not, Officer Carlin may have. But I believe Officer Lampard did.

Q Do you know why DEA declined to prosecute the case?

A They wouldn't prosecute anything under two thousand pounds, and they are swamped with work, as they say.

Q What was the quantity involved here?

A Approximately one thousand pounds, twelve

bales.

Q Were you ever advised of an accurate weight?

A No, sir. I was not. I believe it was less than that. I heard conversation that there was less than that, approximately eight hundred pounds, I'm not sure. I was never advised of an accurate amount.

Q Were there any statements whatsoever made by Mr. Zafra or Mr. Sanchez at the Customs House?

A Yes, sir. Mr. Zafra did make a statement to me concerning his activities.

Q Were you questioning Mr. Zafra?

A No, sir. I was not. He was asked information concerning this R-151 form, and as to his activities---

Q Personal history, you mean?

A Personal history-type of stuff, and he did make a statement voluntarily to me about his activities.

Q Do you recall what you were asking him, specifically, when he made a statement about the facts of the case?

A I believe I was asking him concerning the ownership of the boat, and he stated that it was a friend of his and that, you know, he had borrowed it to go fishing, and he stated that several days prior

to this he had been fishing down in the Key Largo area and that he had discovered a stash of marijuana bales in the Key Largo area, and that he and Mr. Sanchez had gone back this particular day or the night before to retrieve that stash, and he stated that he needed the money for his kids.

Q Did Mr. Zafra say anything else to you or did you pursue any further questioning?

A No, sir.

The other questions were who the owner of the boat was and his personal history, and that was more or less it.

Q Who did Mr. Zafra say owned the boat?

A He said it was a friend named Juan Valdez, and we did have paper work on it. He was the owner of the boat.

Q When you and the other officers initially approached Mr. Zafra and Mr. Sanchez, did you inspect the paper work on the boat at that time?

A Yes, sir. We asked him for the registration paper work, which is our normal practice, and we use it to get the information on the boat as far as the description and FL numbers--we check FL numbers to make sure the boat is the one on the paper work, and all the paper work is up to date and complete, whatever.

I didn't have that paper work. I believe Officer Carlin had it at that time.

Q Now, going back to your first contact with Mr. Zafra and Mr. Sanchez, when questions were being asked about the ownership of the boat and what they had been doing, Mr. Zafra made a statement there at the ramp area that they had been fishing?

A Yes, sir, right.

Q Did he say where they had been fishing at that point in time?

A Yes. He told me in the Key Largo area.

Q Did you or any other Customs Officer of Public Safety Officer ask Mr. Zafra or Mr. Sanchez specifically where they had been fishing?

A No, sir.

Q When you and the other Customs Officers approached Mr. Zafra and Mr. Sanchez to advise them that they were going to be detained for a while, while you conducted a boarding of the boat, did you or any of the other officers have any information that that boat had been outside of the United States and that that boat had crossed the border and had re-entered the United States?

A No, sir.

Q Did you officers, by you I mean all three

Customs Officers, or Officer Butch, have any information or evidence that this particular boat had made any contact with a boat that had been outside of the United States?

A No, sir.

Q Did you have any information or evidence that this Bertram in question in this case had any contact with any vessel that had, itself, had contact with a boat that had been in contact with a boat that had been outside of the United States?

A No, sir.

Q Was there anything particular about this particular Bertram vessel that caused you Customs Officers to decide to approach the individuals that had been on the boat, detain them, and board the boat?

A No, sir. There was nothing in particular outstanding about this boat that made us do it, you know, out of the ordinary.

Q So, essentially, this was part--this stopping of the two men, detaining of them, and advising them you were going to board the boat--was part of the random stopping and boarding you had been doing that morning?

A Yes, sir. It was. The boat was an extremely large boat. It is not unusual for a boat

that length to be on a trailer, but as far as beam and height and everything, it is a large boat. The time of the morning and everything, it fit a profile.

Q Did you have any specific fact that you can point to or state that caused you to believe that some kind of criminal activity was afoot regarding that boat?

A No, sir.

Q Was there anything unusual about the boat whatsoever, as far as its water line?

A No, sir. It was not -- a boat like this, very heavy--it is an old boat, 1975--it was sitting low in the water.

Q There was nothing unusual about the posture of the boat in the water?

A No, sir.

Q You certainly could not smell anything while you were in the van pertaining to the boat?

A No, sir.

Q At the time you Customs Officers approached the two men, stopped them, detained them and advised them you were boarding the boat, you did not smell any aroma of any marijuana at that point, did you?

A No, sir.

Q In fact, marijuana odor was not smelled at

all until you opened that hidden hatch?

A That is correct.

Q As I understand it, when you officers approached Mr. Zafra and Mr. Sanchez and advised them that they were going to be detained while you boarded the boat, they were cooperative in the sense that they did not resist?

A Correct, right.

Q But they were not asked for permission to board the boat, were they?

A No, sir.

Q Maybe you can clear up a question I have.

Officer Butchko was the author of the arrest report in this case, what we call an A-form, and on the arrest report or A-form it reflects that these men were charged with Trafficking of Marijuana over a thousand pounds, Possession with Intent to Distribute, Conspiracy to Commit a Felony, to-wit: Narcotics violation, and Possession of Marijuana over a Thousand Pounds.

Q Do you know when Officer Butchko re-entered the picture and prepared this paper work?

A After we contacted DEA and they declined, then we contacted the Central PSD Unit, who Officer Butchko works for. It was our intention to give the

arrest to Officer Butchko, since he was on the scene--that is our policy--give it to him and let him handle it from the PSD side.

The Central PSD declined to take the case, at which time we---

Q Do you know why they declined?

A Not exactly. We have had that problem before. We have a very hard time sometimes finding people to take it because they have to put their officers on overtime to do it, and, as far as the conviction factor is apparently low, and the man that runs their VIN Section, whose name is Lieutenant Richards--I believe their policy is--at that time was not to take them.

Our office did contact the officers from the south end, Detective Cockreham, who said that they'd take the case, and they did come to our office and we advised them that Officer Butchko from PSD had been the first officer at the scene, and they decided to call him in and let him be the arresting officer for PSD, which, at that time, they contacted his supervisor and they got him over to our office.

At that time he did all the paper work that he had to do for PSD. That was quite a few hours later, over a span of four or five hours, I

believe.

Q Where were Mr. Zafra and Mr. Sanchez at this point?

A They were at our office.

Q Did Officer Cockreham or Public Safety Department Officer Sanchez or Officer Butchko from the Public Safety Department ever interview the defendants, Mr. Sanchez and Mr. Zafra?

A The only thing that I remember them doing was they talked to the individuals directly, to fill out their forms.

Q You mean to get identifying information?

A To get identifying information. They did that with both of them present. They didn't separate them. They were both in our office or conference room, and they filled out the A-form as far as information.

As far as I know, Officer Butchko filled in the report. Other than that, they didn't talk to them, as far as questioning, that I remember.

Q You have no knowledge of whether or not Mr. Zafra or Mr. Sanchez made any statements to Officers Cockreham, Sanchez, or Butchko pertaining to the facts of the case?

A No, sir, not at our office. What they did

when they left, I don't know.

Q Did Mr. Zafra or Mr. Sanchez have any marijuana in their actual, physical possession?

A No, sir.

Q Was there any residue of marijuana on or embedded in the clothing of Mr. Zafra or Mr. Sanchez?

A No, sir.

Q Were there any fibers that you observed on or embedded in the clothing of Mr. Zafra or Mr. Sanchez that in any way could have corresponded to the bales?

A No, sir. We don't look at the clothes.

Q Mr. Zafra said that he discovered the stash of marijuana on one of the Keys in the Florida Keys?

A He stated to me in the Key Largo area. He didn't remember which or exactly or where it was.

Q Based on his description of where he discovered the stash of marijuana, that area would have been within the State of Florida, wouldn't it?

A Yes, sir.

Q Do you have any information or evidence to prove or to suggest that Mr. Zafra brought marijuana into the State of Florida from a place outside of the State?

A No, sir.

Q The first time you saw Mr. Zafra, exactly where was he located?

A The first time we saw him he was getting out of the boat. He was in the boat. The boat pulled up and docked and Mr. Sanchez and Mr. Zafra got out of the boat onto the pier, tied the boat up.

Q Obviously, other than what Mr. Zafra told you, you have no knowledge as to when he got on that boat?

A No, sir.

Q To your knowledge, the first time that Mr. Zafra or Mr. Sanchez were advised of their Constitutional Rights regarding self-incrimination, the right to remain silent and the right to have an attorney present during or before any questioning, was before they were formally under arrest?

A Yes, sir.

Q As I understand it, after Mr. Sanchez and Mr. Zafra were approached by you, Officer Carlin, and Officer Ogden, Officer Ogden's primary responsibility was to go immediately and climb aboard the boat?

A Yes, sir.

Q You and Officer Carlin remained with the two defendants---

A Correct.

Q (Continuing) --and essentially secured them and kept them from leaving?

A Correct.

MR. CLAY: I have no further questions.

You have a right to read and sign this deposition when it is transcribed. However, if you want, you may waive that right.

THE WITNESS: No problem. I will waive.

(Thereupon the taking of the deposition was concluded at 3:30 o'clock p.m.)

(Thereupon reading, signing, and notice of filing were waived).

CERTIFICATE OF NOTARY

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, RALPH FRANCIS, a Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of RICHARD M. NESOSSIS at the time and place hereinabove set forth; that the witness was first duly sworn by me; and that the foregoing pages numbered from 1 to 41, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS MY HAND AND SEAL at Miami, Dade County, Florida, this_____day of February, 1981.

_____
Notary Public

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

Case No. 80-19386

STATE OF FLORIDA,

Plaintiff,

-vs-

SILVIO ZAFRA,

Defendant.

Office of Public Defender
8th Floor Justice Building
1351 N. W. 12th Street
Miami, Florida
Friday, January 30, 1981
4:00 o'clock p.m.

DEPOSITION OF JAMES A. CARLIN

Taken before Ralph Francis, Notary Public in and for the State of Florida at Large, at the time and place set forth above, pursuant to Notice filed herein.

- - - - -

APPEARANCES:

No appearance on behalf of the
State of Florida.

ROSEN, PORTELA, BRONIS, ANGUEIRA & CLAY, P.A.
By: WILLIAM A. CLAY, ESQ.
1395 Coral Way
Miami, Florida
On behalf of the Defendant.

- - - - - -

I N D E X

Witness	Direct	Cross
James A. Carlin	3	--

- - - - - -

Thereupon

JAMES A. CARLIN

was called as a witness, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAY:

Q State your name and occupation for the record, please?

A James A. Carlin. I am a Customs Patrol Officer employed by the Patrol Division in Miami, Florida.

Q How long have you been so employed?

A A little over two years.

Q Prior to that, how were you employed?

A I was a Lieutenant with the Canal Zone Police in the Panama Canal Zone, which is the Federal Police Force.

Q You and CPO Nesossis were friends back then?

A Yes, sir. I was his training Sergeant when he came on as a rookie.

Q Did you have any occasion to be involved in any law enforcement activities relating to a Silvio Zafra and a twenty-five foot Bertram motor vessel?

A Yes, sir. I did.

Q What I propose to do is ask you some questions, but I am going to ask you in a particular way in the interest of speeding up the deposition and saving some time for both of us.

I have completed questioning of CPO's Nesossis and Ogden, and based on that, I think I know what the three of you and Officer Butchko, the Public Safety Department Officer, did in this case.

A My role was, kind of, minor in this instance, maybe some corroboration of what some of the others did. I stayed in the background that night, anyhow.

Q What I propose to do is just summarize what I have learned about the facts of this case from CPO's Ogden and Nesossis, and ask you if that is a correct statement.

If in any way I misstate something or state something that is not accurate or you feel you should expand upon it or explain, go right ahead and do so.

A Sure, I will.

Q With that explanation, I will go ahead and state my summary and stop intermittently to give you a chance to respond.

A Okay.

Q It is my understanding that on the day in question you, Officer Ogden, and Officer Nesossis were located in a Customs surveillance van at the Crandon Park Marina in the general vicinity of the boat ramp---

A Yes, sir, that is right.

Q (Continuing) --and that your activity was taking place in the early morning hours?

A Yes, sir.

Q It is my understanding that you officers were not particularly looking for any particular vessel or subjects that you had been tipped off about?

A No, sir. We were not.

Q You were just generally---

A Just a general surveillance.

Q And as part and parcel of your activity you were randomly stopping certain subjects and vessels and checking them out?

A Yes, sir.

Q Essentially, the three of you were exploring certain vessels for possible violations of the law?

A Yes, sir. We do the larger type trailers--a single axle, one wheel on each side, we don't fool with this because they don't fit a profile. We look for four and six wheelers and tandem-type trailers,

and there were a couple of them there, and that is why we were doing this particular type of surveillance.

Q What type of trailer was involved in the Silvio Zafra case?

A I believe it was a three-axle, three wheels on each side, a three-axle float on, I believe it was.

Q It is also my understanding that as a part of this procedure of randomly stopping certain people in boats you made the decision to approach and stop Mr. Zafra, detain him and board the boat which was already loaded onto a trailer?

A Yes, sir.

Q Your role was primarily what?

A Well, I was driving the van, to begin with, and as we approached the vessel, you know, it takes a few minutes to secure the van, and they had more or less exited before me, a few seconds, and I had a slipped disc in my back and it was bothering me at the time, so they went forward and we would wear a Customs raid jacket, which has the Customs badge and an emblem, and U. S. Customs on the back, and we identified ourselves with the badge.

They identified themselves--I was right behind them--I think it was Nesossis informed him we'd like to check his documents, and we were going to

perform a routine check of his vessel, at which time my role became one of filling out the boarding form which we do in most cases, nearly every case--if you had a complaint, there'd be a record of the search.

I, sort of, stayed back near the truck giving me access to the radio.

Q Your own truck?

A Yes, which was pretty close to the vessel.

Anyway, I had Zafra and Sanchez and there, and I was filling out a boarding form, which is routine-type information, owner of the vessel, Florida number, registration-type information.

Q As you started to fill out the boarding form, did Officer Ogden go immediately to the Bertram and climb aboard and begin his search?

A Yes, sir.

I think, I'm not sure if I had both individuals there, you know, at the exact moment or not, but I think there was a little more conversation and I did see Ogden go directly on the boat, and I'm not sure if Sanchez--anyway, they were both there and I think Nesossis gave me the registration. I'm not sure if I got it directly from him--anyway, I started to fill the boarding form out at that time. I never did go on board the vessel or take part in

that.

Q Mr. Zafra and Mr. Sanchez were advised they had been detained while the boarding and searching was taking place?

A Well, the fact that we would like to check your vessel and check your documents, I guess, indicated to them that they were going to be detained for a short while, but as far as myself telling them, you know, we are going to detain you for this, no, I never told them that.

Q They were not free to go?

A No, sir. I would say not.

Q You would not let them go had they chosen to walk away at that point?

A No, sir. I'm sure we'd have detained them and asked them to stay with the boat and their vehicle.

Q In the course of getting the information to enable you to fill out the boarding form, did you learn where the boat had been, where it had traveled from?

A There is a block there which says, "Arriving from," and, I'm not sure, I think they said they were out fishing. They didn't say where, just out fishing.

Normally, we put down arriving from local or

arriving from Bimini.

Q Your concern is primarily whether this is a vessel returning from outside the United States?

A Yes, sir, basically that is what we are interested in.

Q Whatever you learn from talking to Mr. Zafra or Mr. Sanchez as to where they had embarked from was local as opposed to outside the United States?

A He just said, "We were out fishing." I'm kind of fluent in Spanish. He said they'd been out fishing. He didn't say where. I, more or less, put local, parentheses, fishing, meaning local could mean off the coast of Florida, however you want to translate it.

Q It is my understanding that at no time in this case, either before stopping the men and boarding the boat or after their arrest was any evidence or information developed that this boat had been outside of the United States?

A Nesossis did most of the questioning of them. He did what we call our 151, here (indicating), and I basically was doing like the seizure-type forms.

We do a boat inventory form and inventory of seized merchandise.

I was, sort of, doing that type of paper work

and he was doing the other. Myself, I never determined from them if they had been foreign or not.

Q Do you have any information or evidence to suggest that the two men, Mr. Zafra and Mr. Sanchez, and the boat had been outside the United States?

A No, sir.

Q Do you have any information or evidence to suggest that the two men or the boat had been in contact with any vessel that was outside the United States?

A Well, this is other than the fact that the bales of marijuana, you know, I hate to say routine or a common thing, but they were wrapped very similar to bales that do come from mother ships and from Colombia and Jamaica, that is the only evidence.

Other than that, no, we didn't have any.

Q Did you have any information that the marijuana discovered below deck on the twenty-five foot Bertram was brought into the State of Florida from a place outside of the State of Florida by Mr. Zafra?

A No, sir. I don't.

Q Was there anything unusual about this particular twenty-five foot Bertram or the two men,

Mr. Zafra and Mr. Sanchez, prior to their being stopped and detained and the boat being boarded and searched?

A No, sir. They were moving kind of fast, you know, in other words, when they arrived they were not dilly-dallying at all. They knew what they were doing. Some of the people, when they arrive, they seem to take forever to get their boat out.

They mounted it up pretty fast and were rolling--other than that, there was no information or previous information.

Q However, this fast activity of trailering could have just reflected that they were efficient and knowledgable about trailering boats?

A Sure, yes, sir.

Q It is my understanding that neither Mr. Zafra or Mr. Sanchez were advised of their Constitutional Rights to remain silent, their privilege against self-incrimination, and the right to have an attorney present during questioning until after the marijuana was discovered below deck, at which time they were formally arrested and their rights were read to them?

A I think they were read by Quesada, in Spanish. They were another unit to back us up. We

Q My question was, there was no advisement of rights until the men were formally arrested after the marijuana was discovered?

A No, sir. I think I did all the questioning of them from the time we initially contacted them until they were arrested, and the only questions I asked were general information-type things referring to the boat, but at that exact time they were explained their rights, but prior to that they were not, no.

Q Did you ever observe Mr. Zafra or Mr. Sanchez to be in actual physical possession of any marijuana?

A No, sir.

You mean on his person?

Q Right.

A Other than being in charge of the vessel, no.

Q Is there anything else you know about this case other than what we have already discussed?

A Hearsay-type information. I know Nescsis told me, I am pretty sure it was Zafra had told him that, I think, they had found the marijuana stashed in one of the Keys or in a mangrove or something like

something about his kids, something like that. He needed the money for his family.

Q That statement was allegedly made by Mr. Zafra after the marijuana had been discovered?

A Yes. I believe that was at our office, the Customs Office, after it had been discovered. I don't have anything else.

Fortunately, my back was screwed up at the time and I, sort of, didn't play much of a role in it other than the boarding form. These are kind of a headache, the 151's. I did both of those, and I don't have anything else to add.

MR. CLAY: I have no further questions.

You have a right to read and sign this deposition.

THE WITNESS: I can waive it?

MR. CLAY: Sure.

THE WITNESS: Yes. I will waive it.

(Thereupon the taking of the deposition was concluded at 4:15 o'clock p.m.). Thereupon reading, signing, and notice of filing were waived).

CERTIFICATE OF SERVICE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, RALPH FRANCIS, Notary Public in and for the State of Florida at Large, do hereby certify that I reported the deposition of JAMES A. CARLIN at the time and place hereinabove set forth; that the witness was first duly sworn by me; and that the foregoing pages numbered from 1 to 13, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney or counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS MY HAND AND SEAL at Miami, Dade County, Florida, this____day of February, 1981.

_____
Notary Public

that I think has to supplement the depositions. We would like to take a lot of testimony.

THE COURT: Just in terms of my planning the rest of my day, how much testimony do you think I am going to have to hear?

MS. TARG: At the most, a half hour, 45 minutes.

I have three people. They are on their days off, Your Honor. So, I would like to get them out, also.

THE COURT: Okay.

MR. CLAY: Your Honor, could we just announce several stipulations which would, hopefully, streamline this hearing?

THE COURT: Yes.

MR. CLAY: In the case of The State of Florida versus Silvio Zafra on the motion to suppress evidence, there were three depositions taken in this case of three Customs Patrol Officers. These depositions were taken on January 30, 1981 of Customs Patrol Officer Richard M. Nassosis, Customs Patrol Officer Richard Odgen and Customs Patrol Officer James Carlin.

We are stipulating these depositions into evidence as part of the evidentiary basis, which Your Honor can consider.

THE COURT: Okay.

BURT FRIEDMAN TOM LOMBARDO DALE GENDRON

78 X

as a Defense Exhibit 3.

THE COURT: State.

MS. TARG: No objection.

THE CLERK: Defendant's Exhibit 1.

[Thereupon, the document referred to was marked as Defendant's Exhibit 1 and received in evidence.]

MR. CLAY: Your Honor, in light of the deposition being in evidence, I have no further questions.

THE COURT: The Court has a couple.

Officer, following your examination of the vessel, you took Mr. Zafra and Mr. Sanchez into custody. You arrested them and took them into custody did you not?

THE WITNESS: Yes, sir.

THE COURT: You transported them and the vessel in question to the United States Custom House?

THE WITNESS: Yes, sir. Correct.

THE COURT: It is my understanding then that certain phone calls were made.

Did you make those phone calls?

THE WITNESS: No, sir, I didn't. I believe Officer Chuck Lampert made them.

We called the DEA and Officer Investigation to notify them of the arrest.

THE WITNESS: DEA, yes, sir, they did.

THE COURT: Did they advance a reason to you?

THE WITNESS: No, sir.

The normal reason I understand is that they will not prosecute anything under certain limitations. They have, you know, a limitation in poundage.

THE COURT: I see. Do you know what the limitation is?

THE WITNESS: I believe it's 2000 pounds, sir.

THE COURT: Following the DEA or the U.S. Attorney's declamation to prosecute, what did you then do?

THE WITNESS: Our procedure then is to notify the local police department which has jurisdiction in that particular area.

In this case it was the Dade County Public Safety Department, and they were notified.

THE COURT: Who did that notification?

THE WITNESS: I believe Officer Lampert did.

THE COURT: He was not at the scene of the arrest, was he?

THE WITNESS: No, sir, not originally. He came after everything was over and he did drive the pickup truck back.

Public Safety Department and seriously finally showed up?

THE WITNESS: Yes, sir.

THE COURT: Who was that? Do you know?

THE WITNESS: Officer Cochran. He's a member of the South VIN Squad, and then Officer Butchko, who was a Dade County officer on the scene.

THE COURT: Officer Butchko was on the scene during your inquiries down there at the marina?

THE WITNESS: Yes, sir, he was.

THE COURT: Did he go aboard the boat?

THE WITNESS: No, sir.

He might have.

No, sir, I don't believe he did.

He did, after we searched the boat and found the marijuana, climb up on the trailer and I believe look in at the open hole, but I don't believe he ever actually climbed into the boat.

THE COURT: And then did he go with you to the U.S. Customs House along with the defendants?

THE WITNESS: No, sir, he didn't. We went about his normal patrol.

I believe he was assigned to the Key Biscayne area and, after we did make contact with VIN and they

accept of the case, they requested her presence the

do the paperwork for the County.

THE COURT: I see. I have nothing further.

Either side may inquire of the witness.

MR. CLAY: I have just a couple of questions.

RECROSS EXAMINATION

BY MR. CLAY:

Q After the DEA declined prosecution, the personnel of PSD, the Central Station, was contacted regarding possible prosecution of this case?

A Yes, sir, they were.

Q The personnel at the Central Station of the Public Safety Department, likewise, decline prosecution, did they not?

A Yes, sir, they did.

Q It was only then when the detectives from the VIN Squad of the South Substation of the Public Safety Department were contacted?

A Yes, sir. Correct.

Q They eventually accepted the case and said they would pursue it?

A Correct. Yes, sir.

Q In the course of your discussions with the personnel at that South Substation of the Public Safety Department and in talking with the VIN Squad detectives, is

the case and, for that reason alone, this Court must fall as constituting an unreasonable search and seizure.

Obviously the statements my client made were made as a direct result and exploitation of initial illegalities and an unlawful stop and arrest, and which I contend his detention was, and the unlawful search.

I would just point out to the Court Defendant's Exhibit 1, which is essentially the arrest report of the Customs Officers and as to a reason for the search, it says, "Incidental to arrest."

They may be, in fairness to them, referring to the person search but it is not specified and nowhere in their arrest report does it state that they were performing some type of a registration or documentation check.

Nowhere in this report do they articulate any basis for their suspicion but just the mere fact that they boarded, found contraband and made arrests.

Thank you.

MR. TARG: Your Honor, in the first place, we are not arguing that this was a border search.

THE COURT: You will stipulate that it was not?

MR. TARG: I will stipulate it was not a border search.

BEAT YOU SULLIVAN & LOMBARDI DALE GENDRON

THE COURT: We have gotten over the large threshold.

MS. TARG: I will argue that it was a Customs search and, in determining whether the search was good or not good, you just have to look at the federal law on searches and the federal law on boarding of vessels.

Customs authority 19 U.S.C. 1581A provides that Customs has a right to board any vessel in Customs water to ask for documents or other papers regarding that boat within twelve miles of the coast of the United States, and this boat was seen coming from the waters.

The officers testified that it was only a few miles outside the Atlantic Ocean. It was clearly in Customs waters.

The cases generally hold that Customs may stop any boat in Customs waters.

There are cases which distinguish it and say that, if they are inland waterways, not quite by oceans, then the Customs Officers may make an investigatory stop of a vessel in inland waters under the same section of law 1581A, on facts which justify reasonable suspicion of illegal activity, and this evidence need not support suspicion of a border crossing but only the presence of contraband, and the

Q While you were doing that, the other two Customs Patrol Officers were involved in some other activity?

A That's correct.

Q Is it not true that Customs Patrol Officer Carli was suffering from a back injury, specifically a slipped disc, and he lagged a little bit behind?

A That's correct.

Q You have been testifying regarding three axle trailers and some type of a profile associated with it.

Is it not true that three axle trailers or four axle trailers are just as consistent with being used by innocent boat owners who happen to have large boats that necessitate that type of trailer equipment? Is that not true?

A Yes, sir.

Q There is nothing uniquely specific about three wheel or three axle or four axle trailers which inevitably point to involvement in drug smuggling, is there?

A They dictate a strong possibility in our opinions, but it's possible that they're--I'm sure that they're used by innocent persons.

Q Would you not agree that probably there are more three and four axle boat trailers used innocently--

MS. TARG: Objection.

BERT FRIEDMAN TOM LOMBARDI DALE GRADRON

MR. TARG: That would be calling for speculatio
Your Honor.

THE COURT: He can answer, if he knows.

A I would say that a large percentage of them are
probably innocent.

That's hard to say.

Q Sir, are you saying that you and the other
Customs Patrol Officers first observed the truck and trail
in question in this case at 8:00 p.m. on the night in
question?

A Or thereabouts--eight or nine o'clock.

Q That would essentially be the first involvement
of you and the other officers in this case, would it not?

A That would be the first time we sighted it--
right--and made a note of it.

Q Did I understand you to say that it is your
experience that the typical or customary time it takes a
vessel to travel from, let us say, Crandon Marina to the
Bimini area and return is four to five hours?

A Approximately four and a half to five hours.

Q When you made your observations of this vessel,
you had absolutely no idea what kind of engine it had in
did you?

A No, sir, I didn't.

BERT FRIEDMAN COMPANY DALE GENERON

ORIGINAL

Supreme Court, U.S.
FILED
APR 23 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STATE OF FLORIDA,

Petitioner,

vs.

SILVIO P. ZAFRA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

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STATEMENT OF THE CASE

On October 10, 1980, federal Customs Patrol Officers Nesossis, Ogden and Carlin were observing a boat ramp at the Crandon Park Marina at Key Biscayne. As part of their activities, the officers were randomly stopping and boarding vessels for violations of state or federal law. (R.App. 7-8).

A twenty-five foot Bertram boat was being trailered. Respondent Zafra left the boat with another individual, Sanchez, and drove a truck connected to a trailer alongside the pier to trailer the boat. The federal officers observed a state police officer approach the boat in his patrol car. The officer, Public Safety Department Officer Butchko, pulled his car in front of the truck and conversed with Sanchez and Zafra. Butchko shined his flashlight, looked into the boat, walked to the end of the pier and walked back to the truck with Zafra and Sanchez. (R.App. 9: 29-33). When Officer Butchko completed his investigation and walked away, the customs officers decided to board the boat. (R.App. 6-7).

Officers Carlin and Nesossis detained Sanchez and Respondent Zafra while Ogden climbed aboard the boat and commenced a search. Ogden could not see the deck area until he had climbed aboard the boat. On his hands and knees, he searched and felt the deck. He pulled up carpeting. Officer Nesossis put his nose to a hatch and smelled what he thought was marijuana. Ogden and Nesossis left the boat to obtain tools. They returned, removed the hatch, and seized marijuana. (R.App. 9-15).

The officers had received no tip or intelligence information regarding the boat. Their search was conducted pursuant to the random stopping of people in boats. Nothing unusual about the boat, Respondent Zafra, or Sanchez had been observed prior to the stop, detention, and search. The officers possessed no information indicating that the boat

had been outside the territorial waters of the United States. (R.App. 13-17).

The federal authorities refused to prosecute because of the small quantity of marijuana discovered. The federal arresting authorities turned the evidence and suspects over to the State of Florida. (R.App. 79-82).

Respondent Zafra moved to suppress the warrantless seizure of the contraband as having violated his state and federal rights to be free from unreasonable searches and seizures. At the hearing on the motion to suppress, the State of Florida stipulated that the search and seizure could not be justified as having been a "border search." (R.App. 83-4).

Based upon the prosecution's stipulation and the testimony adduced upon deposition and at the hearing, the trial court entered a written order suppressing the evidence. (R.App. 1-2).

The State of Florida appealed this ruling to the District Court of Appeal of Florida, Third District. In a one-paragraph affirmance of the trial court's order of suppression, the Third District rejected the state's argument that the reasonableness requirement of the fourth amendment did not limit customs officers where the stop and subsequent search of the vessel had occurred in [or near] inland waters. There having been no evidence of a border crossing, the Third District followed then binding state and federal interpretations of 19 U.S.C., § 1581(a) requiring the prosecution to prove a prior reasonable suspicion of illegal activity, citing in its affirmance, inter alia: United States v. Villamonte-Marquez, 652 F.2d 481 (5th Cir.1981); United States v. Guillen-Linares, 643 F.2d 1054 (5th Cir. 1981); United States v. D'Antignac, 628 F.2d 428 (5th Cir.1980); Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974); and distinguishing United States v. Freeman, 579 F.2d 942 (5th Cir. 1978)(stop and boarding on open waters

document check was permissible; subsequent search based upon probable cause discovered thereafter was legal).

After the Supreme Court of Florida declined the petitioner's request to review the affirmance by the Third District, 418 So.2d 1281 (Fla.1982), the petitioner sought review at the same time that the government sought review of the Fifth Circuit's Villamonte-Marquez decision. This Court reversed the Fifth Circuit in United States v. Villamonte-Marquez, 462 U.S. ___, 103 S.Ct. 2573 (1983), and vacated and remanded the Zafra decision for consideration of the new Villamonte-Marquez doctrine.

The Third District applied Villamonte-Marquez and affirmed once again. State v. Zafra, 444 So.2d 1064 (Fla.3d DCA 1984). Review was sought by the petitioner in the Supreme Court of Florida on essentially the same grounds presented here. The Supreme Court of Florida declined to exercise its discretionary jurisdiction.

SUMMARY OF ARGUMENT

This cause does not present a constitutional issue of national significance warranting review by this Court. Similarly, there is no conflict of decisions sufficient to justify certiorari review. The decision sought to be reviewed is one turning upon a novel set of facts. The issue reached the Florida courts because the federal authorities, who arrested the respondent, deemed the case too insignificant and therefore sought and eventually found a local state police department willing to pursue prosecution. The Florida Supreme Court has declined to review the decision of the lower appellate court, presumably because the cause presents no issue of public importance or constitutional significance. For nearly five years, the petitioner has sought to obtain reversal of the trial court's order of suppression. The indigent respondent urges this Court to bring finality to that order by denying certiorari review.

ARGUMENT

Under Florida law, the District Court of Appeal of Florida, Third District, was required to review the order of suppression in the light most favorable to the prevailing party, State v. Nova, 361 So.2d 411 (Fla.1978), who in this Court is the respondent. Before the Third District, the petitioner did not present a full record. The same incomplete record is presented to this Court. Omitted are the following:

-- the order of the trial court granting the defendant's motion to suppress;

-- the deposition of Customs Patrol Officer Richard Ogden;

-- the deposition of Customs Patrol Officer Richard M. Nesossis;

-- the deposition of Customs Patrol Officer James A. Carlin.

In the state trial court, the parties stipulated to the admission of the aforementioned depositions. Florida follows the traditional rule that the appellant bears the burden of producing a record sufficient to warrant reversal. Without a complete record, a Florida appellate court is obligated to affirm the lower court. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla.1979). On that basis alone, affirmance by the Third District was warranted.

Despite this procedural error by the petitioner, the Third District found that the record as supplemented by the respondent warranted affirmance for two reasons. First, unlike United States v. Villamonte-Marquez, 462 U.S. ___, 103 S.Ct. 2573 (1983), the record before the Third District established that "the vessel involved was boarded while located on land atop a boat trailer...". State v. Zafra, 444 So.2d 1064, 1065 (Fla.3d DCA 1984).

Second, the Court found that "the boarding and subsequent search of this land-situated vessel was in no sense undertaken as a document inspection." Id. In order

to align itself with the interpretation of Villamonte-Marquez by the United States Court of Appeals for the Eleventh Circuit, the Florida appellate court applied the holding of United States v. Herrera, 711 F.2d 1546 (11th Cir.1983), quoting the following footnote therefrom:

> "In [Villamonte-Marquez], the Supreme Court held that no suspicion is necessary to stop and board a vessel that is located in waters providing ready access to the open sea to conduct a document inspection pursuant to 19 U.S.C. § 1581(a). The Court also made clear that Customs officers are not precluded from using document check authority simply because they suspect drug smuggling or other illegality on board. ___ U.S. at ___, n.3, 103 S.Ct. at 2577 n.3. However, nothing in that opinion suggests that reasonable suspicion is not required when the Customs officers' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection."

Zafra, supra, 444 So.2d at 1065 (original emphasis), quoting 711 F.2d at 1554 n.13.

The Third District found that the emphasized portion applied because "[n]o one was even on the vessel at the time of the boarding; no effort was made by the Customs officer while aboard to inspect vessel documents or examine the manifest; and the entire search was for the admitted purpose of discovering whether marijuana was concealed on the vessel." 444 So.2d at 1065.

The application by the Third District of the Herrera and Villamonte-Marquez decisions flatly refutes the petitioner's first reason for granting the writ, to wit: that the Third District "rejected" Villamonte-Marquez. Brief of Petitioner on Jurisdiction at 14. The tone of the petitioner's brief suggests that the Third District has intentionally failed in its constitutional duties. The petitioner has overstated its case.

It is the petitioner who is "in error", not the Third District, in the contention that "[t]he [Third] District Court's analysis that the customs officers in the case at bar had not authority to conduct the present search because the officers were also looking for narcotics...". Brief of Petitioner at 15; 19. The Third District did not find that

the officers were also searching for drugs. Rather, by their own admissions, they were only searching for drugs.

The petitioner claims that the decision of the Third District is "not only important to Florida, but is also of immediate, critical importance to federal law enforcement authority and to the security and safety of all citizens in virtually all states in this nation where drug trafficking is a problem." Id. at 20. If the case had been so important to the federal government, the federal authorities would not have turned the seized evidence over to the Florida authorities for the admitted reason that the quantity of marijuana seized was too small.

If the petitioner is referring to the precedential value of the state appellate court decision, the claim remains exaggerated. Apparently the decision is not so important to Florida because the Supreme Court of Florida had an opportunity to exercise its jurisdiction and rule in favor of the petitioner but declined to do so. On the ground that the decision of the Third District expressly decided a constitutional issue, the Florida Supreme Court could have reviewed the decision of the Third District. See Jenkins v. State, 385 So.2d 1356 (Fla.1980). But the Florida Supreme Court remains loyal to the proposition that it will exercise such jurisdiction only when "essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice". Id. at 1357.

Moreover, even assuming, arguendo, that a similarly unusual case might again present itself to Florida courts, the petitioner would undoubtedly argue that the decision of the Third District lacked any precedential value by vitue of the Eleventh Circuit's deletion on rehearing of the footnote in the Herrera decision which was quoted and emphasized by the Third District. See 727 F.2d 1016 (11th Cir.1984). The petitioner's argument that the deletion "has had and will have no effect whatsoever upon the present opinion", Brief

of Petitioner at 21 n.3, is an assumption without supporting facts.

The petitioner also suggests that the officers possessed a reasonable suspicion to conduct the search and seizure based upon a "drug profile". Brief of Petitioner at 24. The testimony provided otherwise. The officers stated that the actions of the respondent and the appearance of the boat and trailer were wholly consistent with innocent behavior.

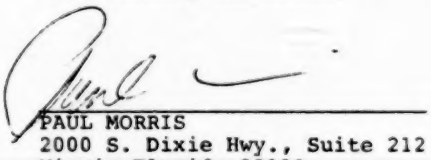
The "good faith" argument advanced by the petitioner was never presented to the trial court and thus, was never properly before any of the Florida appellate courts and should not be considered in this forum.

The petitioner's request for certiorari review should be denied.

CONCLUSION

Based upon the foregoing, the respondent, Silvio Zafra, requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,



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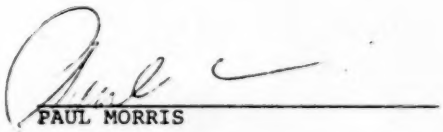
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 23rd day of April, 1985, to Calvin L. Fox, Counsel for the Petitioner, Assistant Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128.



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